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No. 4522

1445

1439

United States

Circuit Court of Appeals

For the Ninth Circuit.

LUTHER WEEDIN, as Commissioner of Immigration at the Port of Seattle, Washington,

Appellant,

vs.

WONG JUN,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

The Filmer Bros. Electrotype Co., San Francisco—3—27—25—60

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF COUNSEL.

THOS. P. REVELLE, Esq., 310 Federal Building, Seattle, Washington,
Attorney for Appellant.

DONALD G. GRAHAM, Esq., 310 Federal Building, Seattle, Washington,
Attorney for Appellant.

HUGH C. TODD, Esq., 323 Lyon Building, Seattle, Washington,
Attorneys for Appellees. [1*]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 8778.

In the Matter of the Application of LEE SHEE and WONG JUN for a Writ of Habeas Corpus.

PETITION FOR WRIT OF HABEAS CORPUS.

To the Honorable JEREMIAH NETERER, District Judge:

Comes now Lee Shee and Wong Jun, petitioners by and through Wong On, their next friend, and petition this court to issue a writ of habeas corpus to inquire into the cause of the detention of said petitioners by Hon. Luther Weedin, Commissioner of

*Page-number appearing at foot of page of original certified Transcript of Record.

Immigration at Seattle, Washington, and show to the Court as follows:

I.

That Lee Shee and Wong Jun applied for admission into the United States from China as members of an exempt class under the treaty between the Government of the United States and the Government of China and the laws of the United States, and are now detained at the United States Immigration Station of Seattle, Washington, by the Hon. Luther Weedin, Commissioner of Immigration, at Seattle, Washington, in the proceedings from their applications to be admitted into the United States.

II.

That the said Lee Shee and Wong Jun are imprisoned and restrained of their liberty by the said Commissioner of Immigration at said Immigration Detention Station; that they have not been committed and are not detained by virtue of any judgment, decree, final order of process issued by a court or Judge of the United States, in a case where such courts or Judges have exclusive jurisdiction under the laws of the United States, or have acquired exclusive jurisdiction by commencement of legal proceedings in such a court, nor are they detained by virtue of the final judgment or decree of a court of competent [2] tribunal of civil or criminal jurisdiction or the final order of such a tribunal made in the special proceedings instituted for any cause except to punish them for contempt; or by virtue of an execution or

other process issued upon such a judgment, decree or final order; or by virtue of a warrant issued from any court upon an indictment or information.

III.

That the cause or pretense of the imprisonment and restraint of the said Lee Shee and the said Wong Jun is that the said Commissioner ruled that the said Lee Shee and the said Wong Jun were alien Chinese persons, ineligible to citizenship under Section 13 Subdivision "C" of the Immigration Act of 1924, not being members of any of the exempt classes of Chinese entitled to come into or remain in the United States, and accordingly denied them admission, from which findings appeals were taken to the Secretary of Labor, which said appeals were thereafter dismissed by the Secretary of Labor on the 5th day of September, 1924.

IV.

That the decision of the above-named officials denying said petitioners admission into the United States is based upon the ground and for the reason that said officials interpret the new Immigration Act of 1924 in such a manner that the said above-named petitioners, who would otherwise be admissible into the United States, as to make them absolutely now inadmissible to the United States, which said ruling is illegal, wrongful, contrary to the laws of the United States and in violation of the treaty between the Government of the United States and the Government of China respecting and governing the admission and exclusion of the subjects of China into and from the United States.

V.

That the facts developed by said hearings in the case of the said Lee Shee by said Immigration officials show that the said Lee Shee is a citizen of China of the Chinese race, having arrived in Seattle, Washington, on the S. S. "President Jefferson," July 9th, 1924, being forty-eight (48) years of age, occupation, housewife, and married to Chu Yee Ping, who is engaged in the Chinese mercantile business in Portland, Oregon, and that the said Immigration officials admit that [3] he maintains an exempt mercantile status within the meaning of the laws of the United States and the treaty between the Government of China and the Government of the United States, which exempt status permits him to remain in the United States although a citizen of China; that the domicile of the petitioner's said husband is in Portland, Oregon; that said petitioner has one daughter and one son now residing in the United States, and that said petitioner is applying for admission into the United States to join her husband and children, thus seeking to establish her domicile with them in the United States.

VI.

That the facts developed by said hearings in the case of the said Wong Jun by said Immigration officials show that the said Wong Jun is a minor, occupation, student, and unmarried; that the said petitioner is applying for admission into the United States to join her father, Wong Dai Teung, a citizen of China of the Chinese race who is engaged in

business in Philadelphia, Pennsylvania, and that he enjoys the status of a merchant and is exempt under the laws of the United States and the treaty between the Government of China and the Government of the United States; that said petitioner is seeking admission to the United States as the minor daughter of said Wong Dai Teung, and that if admitted into the United States she will join her father's household, she being a dependent member thereof, thus making her domicile the domicile of her said father.

VII.

That the evidence presented and testimony taken at said hearings established the above and foregoing facts as set forth in paragraphs 5 and 6 herein, and there was no evidence or testimony to the contrary; that said decision is arbitrary and contrary to law; that there is absolutely no evidence in the record to disprove the right of these petitioners to be admitted into the United States; that said decision, aside from being contrary to law and said treaty, shows that said Immigration officials greatly abuse their discretion holding that said petitioners were not entitled to be admitted into the United States. [4]

VIII.

That the said Lee Shee and Wong Jun are being restrained of their liberty without due process of law in violation of the provisions of the Constitution of the United States and the laws and treaties governing such cases made and provided; that they are wrongfully, illegally and arbitrarily restrained

of their liberty, and that the said immigration officials are about to deport them, and that unless this Court intervenes they will be deported forthwith.

WHEREFORE your petitioners pray that a writ of habeas corpus may issue directed to Hon. Luther Weedin, Commissioner of Immigration, at Seattle, Washington, commanding him to have the bodies of the said Lee Shee and Wong Jun before Hon. Jeremiah Neterer, Judge of the United States District Court, Western District of Washington, Northern Division, at the Federal Court Building in Seattle, Washington, at such time as in said writ may be named, to do and receive what shall then and there be considered concerning the said Lee Shee and Wong Jun, together with the time and cause of their detention; and

FURTHER that an order to show cause be issued by said Court ordering the said Hon. Luther Weedin, Commissioner of Immigration, at Seattle, Washington, to appear and show cause in said court on the 8th day of September, A. D. 1924, at 10 o'clock A. M., why said writ should not issue and to do and receive what shall then and there be considered concerning the said Lee Shee and the said Wong Jun together with the time and cause of their detention.

Dated at Seattle, Washington, September 6th, 1924.

WONG ON,
Petitioner.

HUGH C. TODD,
Attorney for Petitioners. [5]

State of Washington,
County of King,—ss.

Wong On, being first duly sworn, on oath deposes and says: That he is the next friend of Lee Shee and Wong Jun, the petitioners in the above-entitled matter; that he makes this petition and verification for and on their behalf on account of and for the reason that said petitioners do not write in English; that this affiant knows the contents of said petition and believes the same to be true, and in behalf of said petitioners has full authority to sign and verify the same.

WONG ON.

Subscribed and sworn to before me this 6th day of September, 1924.

[Seal] W. D. LAMBUTH,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Sep. 6, 1924. F. M. Harshberger, Clerk. By ————, Deputy. [6]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 8778.

Corpus.

In the Matter of the Application of LEE SHEE and WONG JUN for a Writ of Habeas

ORDER TO SHOW CAUSE WHY WRIT OF HABEAS CORPUS SHOULD NOT BE ISSUED.

On reading and filing the petition of Lee Shee and Wong Jun duly signed and verified, whereby it appears that the said Lee Shee and Wong Jun are wrongfully and illegally imprisoned and restrained of their liberty by Hon. Luther Weedin, Commissioner of Immigration at the United States Immigration at Seattle, Washington, and stating wherein the illegality exists, from which it appears that a writ of habeas corpus ought to issue:

NOW, THEREFORE, it is by this Court ORDERED, ADJUDGED and DECREED that the said Hon. Luther Weedin, Commissioner of Immigration at Seattle, Washington, be directed to show cause before me in the courtroom of said court on the 8th day of September, A. D. 1924, at 10 o'clock A. M. of said day, why said writ should not issue, and to do and receive what shall then and there be considered concerning the said Lee Shee and Wong Jun, together with the time and cause of their detention.

Done in open court this 6th day of September, 1924.

JEREMIAH NETERER,
Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington,

Northern Division. Sep. 6, 1924. F. M. Harshberger, Clerk. By ————, Deputy.

RETURN ON SERVICE OF WRIT.

United States of America,
Western District of Wash.,—ss.

I hereby certify and return that I served the annexed order on the therein named Luther Weedin, Com. of Immigration, by handing to and leaving a true and correct copy thereof with him personally at Seattle, in said District on the 6th day of Sept., A. D. 1924.

E. B. BENN,
U. S. Marshal.
By E. E. Gaskill,
Deputy.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Sep. 8, 1924. F. M. Harshberger, Clerk. By ————, Deputy. [7]

United States District Court, Western District of Washington, Northern Division.

No. 8778.

In the Matter of the Application of LEE SHEE and WONG JUN for a Writ of Habeas Corpus.

RETURN TO WRIT OF HABEAS CORPUS.

To the Honorable JEREMIAH NETERER, Judge of the District Court of the United States for the Western District of Washington:

I, Luther Weedin, to whom the annexed writ of habeas corpus is directed have now here, before the court, the bodies of Lee Shee and Wong Jun, therein named, as therein commanded, and I hereby certify that I am United States Commissioner of Immigration at Seattle, Washington; that the said Lee Shee and Wong Jun are now detained and excluded from the United States by this respondent, as alien persons not entitled to admission under the laws of the United States, to wit; as immigrants and aliens, ineligible to citizenship and excluded under the provisions of Section 13, Subdivisions "a" and "c" of the Act of Congress of May 26, 1924, known as the Immigration Act of 1924; that the said Lee Shee and Wong Jun were detained by this respondent at the time they arrived in the United States, to wit; the 9th day of July, 1924, as alien persons, not entitled to admission under the laws of the United States, and subject to exclusion and deportation under the laws of the United States, pending a decision on the applications for admission to the United States of Lee Shee as the alien Chinese wife of a resident Chinese merchant, lawfully domiciled in the United States, and of Wong Jun as the alien minor son of a resident Chinese merchant, lawfully domiciled in the United States; that at a hearing before the Board of Special Inquiry, the

said Lee Shee and Wong Jun were denied admission by the said Board of Special Inquiry, because it appeared [8] that under Subdivisions "a" and "c" of Section 13 of the Immigration Act of 1924, said Lee Shee and Wong Jun were inadmissible to the United States, and their applications for admission to the United States were denied; that said Lee Shee and Wong Jun appealed from the decision of the Board of Special Inquiry to the Secretary of Labor, and thereafter the decision of the Board of Special Inquiry was affirmed by the Secretary of Labor's and the Commissioner of Immigration's Board of Review; that since the final decision of the Special Board of Review, respondent has and now holds and detains said Lee Shee and Wong Jun for exclusion and deportation from the United States, as alien persons not entitled to admission under the laws of the United States, and subject to exclusion and deportation under the laws of the United States.

That the original records of the Department of Labor, Bureau of Immigration, both on the hearing before the Board of Special Inquiry at Seattle, Washington, and on the submission of the records to the Commissioner of Labor at Washington, D. C. in the matter of the applications of said Lee Shee and Wong Jun for admission to the United States, are hereto attached and made a part and parcel of this return, as fully and completely as though set forth herein in full.

WHEREFORE, respondent prays that the petition for writ of habeas corpus be denied.

LUTHER WEEDIN,
Commissioner of Immigration.
By JOHN L. ZURBRICK,
Asst. Commissioner. [9]

United States of America,
Western District of Washington,
Northern Division,—ss.

John L. Zurbrick, being first duly sworn, on oath deposes and says:

That he is Assistant Commissioner of Immigration, and makes this verification for and on behalf of Luther Weedin, Commissioner of Immigration named in the foregoing return; that he has read said return, knows the contents thereof, and believes the same to be true.

JOHN L. ZURBRICK.

Subscribed and sworn to before me this 15th day of September, 1924.

[Seal] S. M. H. COOK,
Deputy Clerk, U. S. District Court, Western District of Washington.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Sep. 15, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [10]

In the District Court of the United States for Western District of Washington, Northern Division.

No. 8778.

In the Matter of the Application of LEE SHEE and WONG JUN for a Writ of Habeas Corpus.

ORDER FOR WRIT OF HABEAS CORPUS.

The above-entitled matter having come on for hearing in the above-entitled court on the 15th day of September, A. D. 1924, before Honorable Jeremiah Neterer, Judge, upon the order to show cause heretofore issued out of this court based upon the petition herein, the Government being represented by Donald G. Graham, Assistant United States, Attorney, and the said petitioners being represented by their attorney, Hugh C. Tood, and the matter having been then taken under advisement by the Court, and the Court being fully advised in the premises, did upon the 23d day of September, 1924, file his decision therein, holding that said petitioners had been denied a fair hearing as set forth in said petition, and further ordered that the writ as prayed for in said petition shall issue, returnable October 1st, 1924, from which it appears that a writ of habeas corpus ought to issue.

NOW, THEREFORE, it is by this Court ORDERED, ADJUDGED and DECREED, that a writ of habeas corpus issue out of and under the

seal of this court, directed to the said Luther Weedin, Commissioner of Immigration at Seattle, Washington, commanding him to have the bodies of the said Lee Shee and Wong Jun before me in the courtroom of said court on the 1st day of October, A. D. 1924, at 10 o'clock A. M. of said day, to do and receive what shall then and there be considered concerning the said Lee Shee and Wong Jun, together with the time and cause of their detention, and that he then and there have the said writ.

Done in open court this 25th day of September, A. D. 1924.

JEREMIAH NETERER,
Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Sep. 25, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [11]

United States District Court, Western District of Washington, Northern Division.

No. 8778.

In the Matter of the Application of LEE SHEE and WONG JUN for a Writ of Habeas Corpus.

RETURN TO WRIT AS TO WONG JUN.

To the Honorable JEREMIAH NETERER, Judge of the District Court of the United States for the Western District of Washington:

Comes now John L. Zurbrick, Assistant United States Commissioner of Immigration at Seattle, Washington, and for return to the writ of habeas corpus heretofore served upon him, herewith produces in court the body of Wong Jun, and shows and certifies to this Court that further investigation in regard to the status and relationship of said Wong Jun has shown that Wong Chai Chong, the father of petitioner, is not a merchant within the meaning of the laws and treaties of the United States, and that the petitioner, Wong Jun, is, therefore, not entitled to admission to the United States as the minor daughter of an alien Chinese merchant lawfully domiciled in the United States, under the laws and treaties of the United States; that the statement of facts, except as herein modified, contained in the return to the order to show cause, heretofore filed herein, is true and correct, and by reference thereto is made a part of this return the same as though set forth in full.

WHEREFORE, having made a full and complete return and certificate as to the manner and authority by which the said Wong Jun is held, John L. Zurbrick, Assistant United States Commissioner of Immigration, who makes this return,

prays this Court for an order quashing the writ of habeas corpus heretofore entered.

JOHN L. ZURBRICK,
Assistant U. S. Commissioner of Immigration.
[12]

United States of America,
Western District of Washington,
Northern Division,—ss.

John L. Zurbrick, being first duly sworn, on oath deposes and says: That he is Assistant United States Commissioner of Immigration at Seattle, Washington; that he has read the foregoing Amended Return, knows the contents thereof and believes the same to be true.

JOHN L. ZURBRICK.

Subscribed and sworn to before me this 2d day of January, 1925.

[Seal] J. P. SANDERSON,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jan. 2, 1925. Ed M. Lakin, Clerk. By S. E. Leitch, Deputy. [13]

United States District Court, Western District of Washington, Northern Division.

No. 8778.

In the Matter of the Application of LEE SHEE and WONG JUN, for a Writ of Habeas Corpus.

MOTION TO DISMISS AS TO WONG JUN.

Comes now Thos. P. Revelle, United States Attorney for the Western District of Washington, on behalf of the United States Commissioner of Immigration, and respectfully moves the Court for an order dismissing the writ of habeas corpus, heretofore granted to the petitioner, Wong Jun, and dismissing the habeas corpus proceedings herein instituted on behalf of Wong Jun.

This motion is based upon the records and files herein.

THOS. P. REVELLE,
United States Attorney.
DONALD G. GRAHAM,
Assistant United States Attorney.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jan. 2, 1925. Ed. M. Lakin, Clerk. By S. E. Leitch, Deputy. [14]

In the United States District Court for the Western District of Washington, Northern Division.

No. 8778.

In the Matter of the Application of WONG JUN for Writ of Habeas Corpus.

DECISION (ON MOTION TO DISMISS WRIT AS TO WONG JUN).

Filed January 15, 1925.

The petitioner, a Chinese, arrived at the port of Seattle, and sought admission as the minor child of a lawfully domiciled merchant. The exclusion is predicated upon the holding of the district court of the District of Columbia in U. S. ex rel. Mak Fou Cho vs. Davis, Secretary of Labor, 52 Wash. Law Rep. 306. Upon petition this court held that the wives and minor children of lawfully domiciled merchants were admissible, and remanded the case to the Immigration Service to determine the question of admissibility under the Chinese Exclusion Law. On such examination she was excluded because the father is not a merchant. It is conceded that the petitioner was a minor at the time of her arrival, and is the "lawful blood child" of the man she claims is her father, who was admitted as a merchant in 1910 and has since resided here. It is shown that the father is a partner and the assistant manager of one of the largest restaurants in Philadelphia, the Wong Kow Company,

an executive officer of authority, does not act as cook or waiter and performs no manual labor. This company covers the 2d and 3d floors at 1309 Market Street, value of furnishings is $140,000, carries $70,000 insurance, and does an annual business of $130,000 to $140,000.

HUGH C. TODD, Esq., of Seattle, Wash., Attorney for Applicant.

DONALD G. GRAHAM, Esq., Asst. U. S. Attorney, of Seattle, Wash., Attorney for United States.

JEREMIAH NETERER, District Judge.

Is the father a merchant within the provisions of the Exclusion Act?

A manager may be said to be one who has general control over and conducts and directs the affairs of a concern, and has knowledge of all its business and property, and who can act in emergencies on his own responsibility. It affirmatively appears in the record that the father is assistant manager; in the absence of the manager has entire control of the concern. He does no manual labor. He orders goods, oversees and directs the business in the absence of the manager and assists him when he is present.

This case is clearly distinguished from the Mak Fou Cho case, *supra*. Chief Justice McCoy in that case said the petitioner "* * take no part in buying and selling and that his powers are not those of an assistant manager." The Department has, [15] I understand, uniformly held heretofore

that an assistant manager, as is the petitioner, is classed as a merchant. Two minor sons of the petitioner have heretofore been admitted and are now in the United States.

The Exclusion Law defines the words "laborer" and "merchant." Sec. 2, Act Nov. 3, 1893, 28 Stats. page 7.

> "The words 'laborer' or 'laborers' * * shall be construed to mean both skilled and unskilled manual laborers, including Chinese employed in mining, fishing, huckstering, peddling, laundryman, or those engaged in taking, drying, or otherwise preserving shell or other fish for home consumption or exportation."
>
> " * * A merchant is a person engaged in buying and selling merchandise * * and * * does not engage in the performance of any manual labor except such as is necessary in the conduct of his business as such merchant."

The Act, for its purposes, divides the Chinese, except those who come to teach, study, travel, or for curiosity, etc., into two classes, "laborers," those performing manual labor, *excluded;* "merchants," those not performing manual labor, *admissible.* "Merchants," as construed by the department and as employed in the Act, is more comprehensive than the meaning given by lexicographers. The restricted meaning of "merchant" under the Bankruptcy Act,—Toxaway Hotel Co. vs. Smithers & Co., 216 U. S. 439,—in view of the provisions of the Exclusion Act and department

rule, obviously has no application. A banker, by the department rules, is a "merchant." By the same token the manager or assistant manager of a restaurant, who performs no manual labor, is a "merchant." It seems obvious that the purchasing of supplies and selling them cooked, if the party does not do the manual labor of preparing them or serving them, is as truly merchandising as selling goods over the counter, or receiving money on deposit and selling exchange or discounting commercial paper. The acts of the petitioner in Ah Yow, 50 Fed. 561, are not limited, as here, and therefore cannot be authority. It is not necessary that the partner's name appear in the firm title,—Tom Hong vs. U. S., 193 U. S. 517.

Motion denied and writ granted.

JEREMIAH NETERER,
U. S. District Judge. [16]

United States District Court, Western District of Washington, Northern Division.

No. 8778.

In the Matter of the Application of LEE SHEE and WONG JUN for a Writ of Habeas Corpus.

NOTICE OF APPEAL.

To Wong Jun and Hugh C. Todd, Attorney for Wong Jun:

YOU, AND EACH OF YOU, are hereby notified that Luther Weedin, as United States Com-

missioner of Immigration at the port of Seattle, respondent above named, hereby, and now appeals from that certain order, judgment and decree made herein by the above-entitled court on the 16th day of January, 1925, adjudging, holding, finding and decreeing that the above-named petitioner for a writ of habeas corpus be discharged from the custody of the said United States Commissioner of Immigration and from the whole thereof, to the United States Circuit Court of Appeals for the Ninth Circuit.

THOS. P. REVELLE,
United States Attorney.
DONALD G. GRAHAM,
Assistant United States Attorney.

Service accepted 2/3/25.

HUGH C. TODD,
Atty. for Petitioner.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Feb. 5, 1925. Ed. M. Lakin, Clerk. By S. M. H. Cook, Deputy. [17]

United States District Court, Western District of Washington, Northern Division.

No. 8778.

In the Matter of the Application of LEE SHEE and WONG JUN for a Writ of Habeas Corpus.

PETITION FOR APPEAL.

Luther Weedin, United States Commissioner of Immigration at the port of Seattle, Washington, the respondent above named, deeming himself aggrieved by the order and judgment entered herein on the 16th day of January, 1925, discharging the petitioner, Wong Jun, from the custody of the Commissioner of Immigration at the port of Seattle, Washington, does hereby appeal from the said order and judgment to the United States Circuit Court of Appeals for the Ninth Circuit, and prays that a transcript and record of proceedings and papers upon which said order and judgment is made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial District of the United States.

THOS. P. REVELLE,
United States Attorney.
DONALD G. GRAHAM,
Assistant United States Attorney.

Service accepted 2/3/25.

HUGH C. TODD,
Atty. for Petitioner.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Feb. 5, 1925. Ed. M. Lakin, Clerk. By S. M. H. Cook, Deputy. [18]

United States District Court, Western District of Washington, Northern Division.

No. 8778.

In the Matter of the Application of LEE SHEE and WONG JUN for a Writ of Habeas Corpus.

ASSIGNMENT OF ERRORS.

I.

The Court erred in holding and deciding that the petitioner, Wong Jun, did not have a fair and impartial trial before the United States Inspector of Immigration conducting her hearing.

II.

The Court erred in holding and deciding that a writ of habeas corpus be awarded to the petitioner, Wong Jun.

III.

The Court erred in denying the motion of the Commissioner of Immigration to dismiss the writ of habeas corpus granted to the petitioner, Wong Jun.

IV.

The Court erred in holding and deciding that the father of the petitioner, Wong Jun, is a merchant within the meaning of the Chinese Exclusion Laws and the Treaties of the United States.

V.

The Court erred in holding, deciding and adjudging that the petitioner, Wong Jun, be discharged

from the custody of Luther Weedin, Commissioner of Immigration at the port of Seattle, Washington. [19]

VI.

The Court erred in deciding, holding and adjudging that the petitioner, Wong Jun, was not subject to exclusion and deportation, but was entitled to come and remain in the United States.

THOS. P. REVELLE,
United States Attorney.
DONALD G. GRAHAM,
Assistant United States Attorney.

Service accepted 2/3/25.

HUGH C. TODD,
Atty. for Petitioner.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Feb. 5, 1925. Ed. M. Lakin, Clerk. By S. M. H. Cook, Deputy. [20]

United States District Court, Western District of Washington, Northern Division.

No. 8778.

In the Matter of the Application of LEE SHEE and WONG JUN for a Writ of Habeas Corpus.

ORDER ALLOWING APPEAL.

Now, to wit, on the 2d day of February, 1925, it is ORDERED that the appeal of the United States

Commissioner of Immigration in respect to Wong Jun, petitioner for writ of habeas corpus, named herein, be allowed, as prayed for.

Done in open court this 5 day of February, 1925.

JEREMIAH NETERER,
United States District Judge.

O. K. as to form.

HUGH C. TODD,
Atty. for Petitioner.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Feb. 5, 1925. Ed. M. Lakin, Clerk. By S. M. H. Cook, Deputy. [21]

United States District Court, Western District of Washington, Northern Division.

No. 8778.

In the Matter of the Application of LEE SHEE and WONG JUN for a Writ of Habeas Corpus.

STIPULATION.

IT IS HEREBY STIPULATED AND AGREED by and between Hugh C. Todd, Esquire, attorney for petitioners above named, and Thos. P. Revelle and Donald G. Graham, attorneys for respondent, Luther Weedin, United States Commissioner of Immigration, that

WHEREAS, petitioner, Lee Shee, applied for admission to the United States as the lawful wife of a resident alien Chinese merchant; and

WHEREAS, in accordance with the ruling of the Court heretofore made in the case, "In the Matter of the Application of Goon Dip, on Behalf of Ng Jin Sing, et al., for a Writ of Habeas Corpus," No. 8749, now pending in this court, a writ of habeas corpus was granted to said Lee Shee, on the ground that the Immigration Act of 1924 does not prohibit the entry of wives of alien Chinese merchants; and

WHEREAS, the identical question of law involved is now before the Supreme Court of the United States, under writ of certiorari, directed to the United States Circuit Court of Appeals for the Ninth Circuit, and

WHEREAS, it will entail a matter of considerable time and expenditure of funds to prosecute the appeal in the matter of said Lee Shee by the United States Commissioner of Immigration, which expenditure of time and funds will be unnecessary in view of the ultimate decision of said question of law by the United States Supreme Court, it is stipulated that the petitioner, Lee [22] Shee, heretofore granted a writ of habeas corpus, may remain at liberty under bond until the question involved in her case is finally determined by the United States Supreme Court, and that the disposition of the case of said Lee Shee shall abide the said determination by the United States Supreme Court.

Dated at Seattle, Washington, this 2 day of February, 1925.

THOS. P. REVELLE,
United States Attorney,
DONALD G. GRAHAM,
Assistant United States Attorney,
Attorneys for Respondent.
HUGH C. TODD,
Attorney for Petitioner.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Feb. 5, 1925. Ed. M. Lakin, Clerk. By S. M. H. Cook, Deputy. [23]

United States District Court, Western District of Washington, Northern Division.

No. 8778.

In the Matter of the Application of LEE SHEE and WONG JUN for a Writ of Habeas Corpus.

ORDER FOR TRANSMISSION OF ORIGINAL RECORD.

Upon stipulation of counsel, it is by the Court ORDERED, and the Court does hereby ORDER that the Clerk of the above-entitled court transmit with the appellate record in said cause the original file and record of the Department of Labor, covering the deportation proceedings against the petitioner, Wong Jun, which was filed with the re-

spondent's return in the above cause, directly to the clerk of the Circuit Court of Appeals, in order that the said original immigration file may be considered by the Circuit Court of Appeals in lieu of a certified copy of said record.

Done in open court this 5 day of February, 1925.

JEREMIAH NETERER,
United States District Judge.

O. K. as to form.

HUGH C. TODD,
Atty. for Petitioner.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Feb. 5, 1925. Ed. M. Lakin, Clerk. By S. M. H. Cook, Deputy. [24]

United States District Court, Western District of Washington, Northern Division.

No. 8778.

In the Matter of the Application of LEE SHEE and WONG JUN for a Writ of Habeas Corpus.

PRAECIPE OF APPELLANT FOR TRANSCRIPT OF RECORD ON APPEAL.

To the Clerk of the above-entitled Court:

You will please prepare and duly authenticate the transcript and following portions of the record in the above-entitled case, for appeal of the

said appellant, heretofore allowed to the United States Circuit Court of Appeals for the Ninth Circuit:

1. Petition for writ of habeas corpus.
2. Order to show cause.
3. Return to order to show cause, as to Wong Jun.
4. Order for writ of habeas corpus.
5. Return to writ as to Wong Jun.
6. Amended return to writ as to Wong Jun.
7. Motion to dismiss writ as to Wong Jun.
8. Decision of Honorable Jeremiah Neterer.
9. Petition for appeal.
10. Notice of appeal.
11. Assignment of errors.
12. Order allowing appeal.
13. Citation.
14. Stipulation dated February 2, 1925.
15. Order for transmission of record.

THOS. P. REVELLE,
United States Attorney,
DONALD G. GRAHAM,
Assistant United States Attorney,
Attorneys for Appellant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Feb. 5, 1925. Ed M. Lakin, Clerk. By S. M. H. Cook, Deputy. [25]

In the District Court of the United States for Western District of Washington, Northern Division.

No. 8778.

In the Matter of the Application of LEE SHEE and WONG JUN for a Writ of Habeas Corpus.

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington,—ss.

I, Ed. M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 28 inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the clerk of said District Court at Seattle, and that the same constitute the record on appeal herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees

and charges incurred and paid in my office by or on behalf of the appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [26]

Clerk's fees (Sec. 828, R. S. U. S.) for making record, certificate or return, 51 folios at 15¢	$7.65
Certificate of Clerk to transcript of record, 4 folios at 15¢	.60
Seal to said certificate	.20
Certificate of Clerk to original exhibits	.30
Seal to said certificate	.20
Total	$8.95

I hereby certify that the above cost for preparing and certifying record, amounting to $8.95, will be included as constructive charges against the United States in my quarterly account to the Government of fees and emoluments for the quarter ending March 31, 1925.

I further certify that I herewith attach and transmit the original citation issued in this cause.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 9th day of March, 1925.

ED. M. LAKIN,
Clerk United States District Court, Western District of Washington.

By S. M. H. Cook,
Deputy. [27]

United States District Court, Western District of Washington, Northern Division.

No. 8778.

In the Matter of the Application of LEE SHEE and WONG JUN for a Writ of Habeas Corpus.

CITATION.

United States of America, as to Wong Jun, GREETING:

WHEREAS, Luther Weedin, United States Commissioner of Immigration at the port of Seattle, Washington, has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment, order and decree lately, on to wit, the 16th day of January, 1925, rendered in the District Court of the United States for the Western District of Washington, made in favor of you, adjudging and decreeing that said petitioner be discharged from the custody of said Luther Weedin, as United States Commissioner of Immigration at the port of Seattle, Washington, and setting her at large.

You are therefore cited to appear before the United States Circuit Court of Appeals, in the city of San Francisco, State of California, within the time fixed by statute, to do and receive what may obtain to justice to be done in the premises.

Given under my hand in the city of Seattle, in the Ninth Circuit, this —— day of February, in the year of our Lord nineteen hundred twenty-five,

and the Independence of the United States the one hundred forty-ninth.

JEREMIAH NETERER,
United States District Judge.

Service accepted—2/3/25.

HUGH C. TODD. [28]

Filed in the United States District Court, Western District of Washington, Northern Division. Feb. 5, 1925. Ed. M. Lakin, Clerk. By S. M. H. Cook, Deputy.

[Endorsed]: No. 4522. United States Circuit Court of Appeals for the Ninth Circuit. Luther Weedin, as Commissioner of Immigration at the Port of Seattle, Washington, Appellant, vs. Wong Jun, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed March 11, 1925.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the

United States Circuit Court of Appeals

For the Ninth Circuit 2

No. 4522

LUTHER WEEDIN, as Commissioner of Immigration at the Port of Seattle, Washington,

Appellant,

vs.

WONG JUN,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE JEREMIAH NETERER, JUDGE

Brief of Appellant

THOS. P. REVELLE
United States Attorney
DONALD G. GRAHAM
Assistant United States Attorney
Federal Building
Seattle, Washington

In the

United States Circuit Court of Appeals

For the Ninth Circuit

No._____

LUTHER WEEDIN, as Commissioner of Immigration at the Port of Seattle, Washington,

Appellant,

vs.

WONG JUN, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE JEREMIAH NETERER, JUDGE

Brief of Appellant

STATEMENT OF THE CASE

Wong Jun, hereafter referred to as respondent, upon her arrival from China, July 9, 1924, on the S. S. "President Jefferson," applied for admission to the United States as minor daughter of a

domiciled Chinese merchant. She claims to have been born in China August 20, 1904, to be unmarried and to be the daughter of Wong Chai Chong.

The father, Wong Chai Chong, was born in China and first came to this country September 4, 1910, through the port of San Francisco, as a Hong Kong Section 6 merchant. He has never been to China since. He claims the status of a merchant at the present time by virtue of the fact that he has $1,000 interest in the Wong Kew Restaurant, Philadelphia, Pennsylvania, that he was connected with that establishment for several years prior to appellee's arrival, at first as cashier, and since September, 1923, as assistant manager. He is stated to have charge of the restaurant when the manager is absent and also to take cash and assist in "checking and counting up at the end of the day."

The partnership list shows that Wong Leong Bing is steward of the restaurant and it would hence seem probable that he attends to the buying for the restaurant. It also appears that his financial interest is three times greater than that possessed by the other alleged active partners.

Respondent was given hearings before a Board of Special Inquiry at Seattle on July 18, 1924, and on August 14, 1924, and was denied admission under the Immigration Act of 1924, on the ground that she was an alien ineligible to citizenship and did not come within any exemption in said Act. On appeal to the Secretary of Labor, the decision of the Board of Special Inquiry was affirmed.

Thereafter respondent was ordered deported and a petition for a Writ of Habeas Corpus was filed. After a hearing on an order to show cause why a Writ of Habeas Corpus should not issue, an order was entered September 23, 1924, by the Honorable Jeremiah Neterer, granting the writ but making same returnable October 1, 1924, for the purpose of affording opportunity to the Board of Special Inquiry to further examine the alien and determine her physical and mental fitness under the Immigration Law and her relationship to her alleged father.

On September 26, 1924, the respondent was given a hearing before a Board of Special Inquiry at the United States Immigration office at the port of Seattle, Washington, with a view to determining her relationship to Wong Chai Chong, her alleged father, and subsequently said Wong Chai Chong was examined at Philadelphia, Pennsyl-

vania, and respondent's two alleged brothers were examined at San Francisco, California, for the same purpose. An investigation was also conducted at Philadelphia, Pennsylvania, to determine the mercantile status of Wong Chai Chong. Thereafter, on November 21, 1924, respondent was given another hearing before the Board of Special Inquiry which conceded that respondent is the daughtre of Wong Chai Chong and also conceded the latter's claim as to his connection with and duties in the Wong Kew Restaurant, but denied respondent admission for the reason that her father, Wong Chai Chong, was not a "merchant" within the meaning of the law, this cause of denial being under the Act of November 3, 1893 (28 Stat. L. 7) "amending the law prohibiting the coming of Chinese persons into the United States and providing for registration of resident laborers," and being a cause additional to the previous causes of denial under the Immigration Act of 1924.

Thereafter an appeal was taken to the Secretary of Labor and said appeal was dismissed.

Thereafter a motion was filed in the United States District Court for the Western District of Washington, Northern Division, to dismiss the Writ of Habeas Corpus as to respondent, Wong

Jun, and after argument said motion was denied and the writ granted by the Honorable Jeremiah Neterer, January 15, 1925.

The Commissioner of Immigration duly filed his notice of appeal and proceedings to perfect said appeal were duly instituted and the following assignments of error were urged:

1

The court erred in holding and deciding that the petitioner, Wong Jun, did not have a fair and impartial trial before the Board of Special Inquiry and the Secretary of Labor.

2

The court erred in holding and deciding that a Writ of Habeas Corpus be accorded to the petitioner, Wong Jun.

3

The court erred in holding, deciding and adjudging that the petitioner, Wong Jun, be discharged from the custody of Luther Weedin as Commissioner of Immigration at the port of Seattle.

4

The court erred in deciding, holding and adjudging that the petitioner, Wong Jun, was not subject to exclusion and deportation, but was entitled to come into and remain in the United States.

Respondent's exclusion can be predicated solely on the Chinese Exclusion Law without resorting to the Immigration Act of 1924. Inasmuch as the question of the admissibility of minor children of domiciled Chinese merchants, as affected by the Immigration Act of 1924, has been certified to the Supreme Court of the United States, it is felt that Your Honors probably will not care to pass upon the admissibility of respondent under that Act. A stipulation has, therefore, been entered into between counsel for the Commissioner of Immigration and counsel for respondent to the effect that, in the event it becomes necessary and Your Honors do not care to rule upon this question of law, this part of the case may be held in abeyance and respondent's right to admission, insofar as same is affected by the Immigration Act of 1924, be determined by the decision of the Supreme Court of the United States upon the cases of like character now before it.

Respondent's Admissibility Under the Chinese Exclusion Law

Prior to the passage of the Immigration Act of 1924 it had become a settled principle that minor children of domiciled Chinese merchants were allowed to enter this country for the purpose of joining their fathers. This right was not expressly granted by the Treaty of 1880 but rests upon a decision of the Supreme Court of the United States. Three factors necessarily had to be established: (1) the minority of the applicant for admission, (2) the relationship of father and child, (3) the mercantile status of the father. In the present case the minority of respondent and the claim that she is a daughter of Wong Chai Chong have been conceded. The only question at issue is whether or not Wong Chai Chong is a "merchant." *It is submitted that he is not entitled to be classed as such.* The fact that Wong Chai Chong was admitted to this country nearly fifteen years ago under what is known as a Section 6 Certificate — that is, a certificate provided for by Section 6 of the Act of May 6, 1882, as amended and added to by the Act of July 5, 1884 (22 Stat. L. 58; 23 Stat. L. 115), does not *per se* clothe

him with a mercantile status at this time, his Section 6 Certificate having been required by law as a condition precedent to his admission and having no other effect than as *prima facie* evidence of his occupation in China prior to coming to this country. It has been held by the courts that a Chinese entering this country by virtue of holding such a document is not obligated to maintain a mercantile status indefinitely but is entitled to remain here notwithstanding a subsequent change in his status from merchant to laborer.

Lo Hop v. United States, 257 Fed. 489;

Lui Hip Chin v. Plummer, 238 Fed. 763.

Consequently, whether or not Wong Chai Chong is a "merchant" depends entirely on his present occupation (during the last twelve months), regardless of any mercantile status he may have had at the time of his original entry into this country.

Section 2 of the Act of November 3, 1893, *supra*, defines the term "merchant" as employed in said Act and in the Acts of which same is amendatory as having the following meaning *and none other:* "A merchant is a person engaged in buying and selling merchandise, at a fixed place of business, which business is conducted in his name, and who

during the time he claims to be engaged as a merchant, does not engage in the performance of any manual labor except such as is necessary in the conduct of his business as such merchant."

This section further provides: "Where an application is made by a Chinaman for entrance into the United States on the ground that he was formerly engaged in this country as a merchant, he shall establish by the testimony of two credible witnesses other than Chinese the fact that he conducted such business as hereinbefore defined for at least one year before his departure from the United States, and that during such year he was not engaged in the performance of any manual labor, except such as was necessary in the conduct of his business as such merchant, and in default of such proof shall be refused landing." In view of this provision the Department of Labor has consistently held that, in order to obtain favorable endorsement of his mercantile status prior to his proposed departure for China, a Chinese merchant must establish that he has maintained a mercantile status for twelve months prior to his application. This rule has also been consistently applied in cases where Chinese merchants were bringing wives or minor children to this country.

See Rule of May 1, 1917. Rule 2 this

The Supreme Court has held that it is not necessary that a partner's name shall appear in the title of the firm of which he is a member.

Tom Hong v. United States, 193 U. S. 517.

Therefore, the clause in the definition of "merchant" reading "which business is conducted in his name" is eliminated as a point of argument.

The courts have held that all Chinese not included in the exempted classes, i. e., teachers, students, merchants and travelers for curiosity, are laborers.

United States v. Ah Fawn, 57 Fed. 591;

Lai Moy v. United States, 66 Fed. 955;

United States v. Chung Ki Foon, 83 Fed. 143;

Lew Quan Wo v. United States, 184 Fed. 685;

Ong Chew Lung v. Burnett, 232 Fed. 853.

Ownership in a mercantile establishment is not sufficient to constitute a merchant unless the Chinese whose status is in question is engaged in buying and selling merchandise.

United States v. Wong Yew, 83 Fed. 832.

A salesman or manager of a mercantile business even though he is entitled to a percentage of the profits is not a merchant within the meaning of

the Immigration Act of 1917. "The confounding of occupations—that of salesman or manager with that of merchant—cannot be accepted. A merchant is the owner of the business; a salesman or manager, a servant of it; and especially so under the Immigration Law."

Tulsidas v. Insular Collector, 262 U. S. 259.

A Restaurant Keeper Is Not Engaged in the Business of Buying and Selling Merchandise

The term merchandise is defined by the Century Dictionary: "In general, any object of trade or traffic; that which is passed from hand to hand by purchase and sale; specifically the objects of commerce, the staple of a mercantile business; commodities, goods or wares bought or sold for gain."

It is defined by the Standard Dictionary as: "Anything moveable customarily bought and sold for profit; especially commodities traded in by merchants."

It is defined by Webster's New International Dictionary: "The objects of commerce; whatever is usually bought or sold in trade or market, or by merchants; wares; goods, commodities."

In the case of *Ah Yow*, 59 Fed. 561, the court held that a restaurant proprietor is a laborer. The court said:

"A restaurant keeper is a caterer, who keeps a place for serving meals, and provides, prepares, and cooks raw material to suit the tastes of his patrons. A person in that business is not a merchant, nor does he come within the definition of any of the terms used in the statutes to describe the class of Chinese who are privileged to enter the United States; and I hold that to the word 'laborer' in these statutes meaning must be given broad enough to include master mechanics and tradesmen such as blacksmiths, cabinet makers, tailors and shoemakers, who receive orders and cut and make up materials in such form and of such dimensions as their customers require. Those who, in following such callings employ journeymen, and perform no manual labor themselves still represent themselves to be, and they are, in popular estimation, blacksmiths, cabinet makers, tailors and shoemakers—that is to say, skilled workmen. All Chinese persons who follow such callings are barred from coming to the United States. I hold that a restaurant keeper belongs to the same class and is likewise barred."

In the case of the *United States v. Chung Ki Foon*, 83 Fed. 143, the court said:

"* * * In my opinion the words 'Chinese laborers' as used in Section 1 of the Act of November

3, 1893 (28 Stat. L. 7), refer not only to those actually engaged in manual labor at the date of the passage of that Act, but were intended to include all Chinese persons dependent upon their manual labor as a means of securing an honest livelihood and self-support, and those who are not officers, teachers, students, merchants, or travelers for curiosity within the meaning of the Treaty of November 17, 1880, between the United States and China."

The court also quoted the case of *Ah Yow*, 59 Fed. 561, and concurred with the decision in same, stating, "It was held, *and I think correctly* (italics ours), in the case of In re Ah Yow, 59 Fed. 561, that a restaurant keeper is to be classed as a laborer under a proper construction of the Act of Congress under consideration * * * ."

In the case of *Toxaway Hotel Co. v. Smathers & Co.*, 216 U. S. 439, the Supreme Court of the United States held that keeping a hotel was not a mercantile pursuit within the meaning of Section 4 of the Bankruptcy Act of 1898 and it was stated:

"To say that he buys and sells articles of food and drink is only true in a limited sense. Such articles are not bought to be sold, nor are they sold again, as in ordinary commerce. They are bought to be served as food or drink and the price

includes rent, service, heat, light, etc. To say that such a business is that of a 'trader' or a 'mercantile pursuit' is giving those words an elasticity of meaning not according to common usage."

In the case of *In re Wentworth Lunch Co.*, 159 Fed. 413, affirmed by the Supreme Court in a *per curiam* decision in 217 U. S. 591, the Circuit Court of Appeals for the Second Circuit said: "A trader is one who buys to sell again, a definition which might apply to a saloon but not to a restaurant, where the proprietor does not sell the provisions he buys in the form in which he buys them, but changes by combination and cooking into edible dishes. The word 'mercantile,' though including trade, is larger, being extended to all commercial operations, so that we speak of shipping merchants, commission merchants and forwarding merchants. Still, we do not think that the dishes of a restaurant would ever be described as merchandise, or the proprietor as a merchant, or as engaged in mercantile pursuits."

Although the cases just cited were under the Bankruptcy Act, it is difficult to understand why the word "merchandise" should have one meaning under that act and an entirely different meaning under the Chinese Exclusion Act, unless at least a

technical definition of the word were contained in each act. This is not the case and there is no reason why the term "merchandise" as used in the Act of November 3, 1893, *supra*, should have any different meaning than as generally defined and accepted. It would also be an extremely anomalous situation if an owner of or partner in a Chinese restaurant should be legally held to be a merchant for the purpose of bringing a wife or minor children to this country and yet be denied the benefit of the Bankruptcy Laws on the ground that he is not engaged in business of a mercantile character.

The case directly in point and controlling it is submitted, on the question raised in this appeal is that of *U. S. ex rel. Mak Fou Cho v. James J. Davis, Secretary of Labor*, reported in Washington Law Reporter, Vol. 52, No. 20, page 306, a case decided by the Supreme Court of the District of Columbia, sitting as a Circuit Court in April, 1924. The petitioner in this case was the bookkeeper and cashier of a Chinese restaurant owning an interest therein and performing no manual labor in connection with the conduct of the business. It also appeared that he sold cigars and cigarettes to patrons of the restaurant. There was some testimony to the effect that the petitioner held the title of "Assistant

Manager," but it did not appear that he bought food stuffs or that his was the final word in any important matters. He made application to the Secretary of Labor for preinvestigation of his status as a merchant, in order that he might bring his minor son from China to this country, and the Secretary of Labor had held that his status was not that of a merchant. He then applied for a writ of mandamus, directing the Secretary to approve his application. The petition for writ of mandamus was denied, the court stating:

"Had the respondent found that the restaurant business is not mercantile, and that one carrying it on in any capacity is not engaged in 'buying and selling,' his decision would not have been arbitrary or capricious, for courts have differed as to that in construing the Exclusion Laws, and the Supreme Court, in construing the Bankruptcy Laws, has held that one engaged in the restaurant business is not engaged in a trading or mercantile pursuit. Nollman & Co. v. Wentworth Lunch Co., 217 U. S. 591 following Toxaway Hotel Co. v. Smathers, 216 U. S. 439, where speaking of articles of food the court says: 'Such articles are not bought to be sold, nor are they sold again as in ordinary commerce.' In the Toxaway case it was held also that running a grocery store in connection with the hotel did not make the hotel business mercantile. So here selling cigars and cigarettes does not make the restaurant business mercantile. The respondent therefore did

not make the broad ruling as to the mercantile status which he might have made without interference from the court, and likewise he may not be controlled as to his decision that the petitioner did not come within the more liberal ruling made in other cases, namely, that the part owner of such a restaurant who has charge of buying and selling of food is a merchant. The question was one which the respondent had jurisdiction to decide, and for the reasons already stated herein he can not be forced to make a different decision."

In deciding the present case, Judge Neterer states that the *Mak Fou Cho* case is distinguishable in that the petitioner in that case took no part in buying and selling and his powers were not those of an assistant manager. It is true that a finding was made by the Secretary of Labor to this effect but the opinion also sets out the testimony of the petitioner before the Secretary of Labor's investigating board to the effect that he has the title of "Assistant Manager." In the case now before Your Honors, it does not appear that Wong Chai Chong took any part in the buying and selling. In the instant case, furthermore, according to the statements of both Wong Chai Chong and Kin C. Wong, manager of the Wong Kew restaurant, Wong Chai Chong was formerly *Cashier* and did not become assistant manager until September, 1923.

Consequently, he was assistant manager considerably less than one year prior to respondent's arrival, and for that reason could not have complied with the requirements of section 2 of the Act of November 3, 1893, and could not have obtained the Immigration Bureau's favorable endorsement, even though it be considered that the position of manager or assistant manager of a restaurant is enough to give a mercantile status. As stated before, the regulations of the Department, in conformity with said Act, have always required that a domiciled Chinese merchant must establish a mercantile status for at least one year prior to his application for preinvestigation, and the same requirement has always existed as a condition precedent to securing the admission of a wife or minor child. A Chinese cashier of a restaurant has never been regarded by the Department as a merchant solely by reason of performing the duties of a cashier.

It is not considered, however, that a showing that Wong Chai Chong was assistant manager of the Wong Kew restaurant even for one year prior to respondent's application for admission, would entitle the respondent to admission as the minor child of a merchant.

Judge Neterer also states in his opinion that the Department has uniformly held, heretofore, that an assistant manager, as is the "Petitioner," is classed as a merchant and mentions the fact that two minor sons of the petitioner have heretofore been admitted and are now in the United States. (The word "petitioner" seems to be in error and to really refer to petitioner's father, Wong Chai Chong.) In this connection, it may be stated that the law and regulations were apparently complied with by Wong Chai Chong in 1914 and in 1921, when he brought two sons to this country, and the fact of their admission at the time stated has no bearing on the merits of the present case.

From the Treaty of 1880 until 1893, the proprietor of a restaurant was held to be a laborer. After the decision of the Attorney General in 20 Opinions 602, rendered shortly before the passage of the Act of 1893, the practice of the Department was changed and restaurant keepers were held to be merchants. In 1898 the case of *Ah Yow*, 52 Fed. 561, and *Chung Ki Foon*, 83 Fed. 143, hereinbefore referred to, came to the attention of the Department and the original practice was resumed and followed until December, 1915, when the practice was adopted of holding that, while restaurants are

not mercantile establishments, the owners thereof, whose duties are solely of a managerial or executive nature, are merchants. This practice was continued until the decision in the *Mak Fou Cho* case was rendered and recognized by the Department as the law.

Although the practice of the Department has not been uniform, it needs no citation of authority to your Honors to sustain the proposition that the Department of Labor may change a regulation at any time, provided such change is consistent with the law.

Judge Neterer also states in his opinion, after quoting the definitions of laborer and merchant:

"The Act, for its purpose, divides the Chinese, except those who come to teach, study, travel or for curiosity, etc., into two classes, 'laborers,' those performing manual labor, *excluded*; 'merchants,' those not performing manual labor, *admissible*. 'Merchants' as construed by the Department, and as employed in the Act, is more comprehensive than the meaning given by lexicographers. The restricted meaning of 'merchant' under the Bankruptcy Act—Toxaway Hotel Company v. Smathers and Company—in view of the provisions of the Exclusion Act and Department rule, obviously has no application. A banker, by the Department rules, is a 'merchant.' By the same token the manager

or assistant manager of a restaurant, who performs no manual labor, is a merchant."

This quotation from the opinion would indicate that Judge Neterer considers all Chinese who do not perform manual labor to be merchants, with the exception of those mentioned as the other classes exempted. This view of the law is entirely erroneous.

In *Ong Chew Long v. Burnett*, 232 Fed. 853, it was held that a manufacturer engaged solely in conducting a factory is a laborer. In *U. S. v. Ah Fawn*, 57 Fed. 591, it was held that Chinese gamblers and highbinders are laborers. In *U. S. v. Oin Kwan*, 100 Fed. 609, it was held that a Chinese person assisting in the business of a mercantile company, keeping the books and selling the goods and holding an interest in the stock of the goods of such company, is not a merchant.

In *Lai Moy v. U. S.*, 66 Fed. 955, the court states:

"It will be observed that the definitions of the Act are very careful and confined, and we may not enlarge them. The designation 'merchant' does not include, comprehensively, all who are not laborers, but strictly 'a person (to quote the act) engaged in buying and selling merchandise.' To fabricate merchandise, as appellant did, is not to buy and sell it."

And it was held that a Chinese person, a member of a firm engaged in the clothing business, who assists in cutting and sewing garments for the firm, is not a merchant. It would not be difficult to conceive of several other occupations which a Chinese might follow, which might involve no manual labor and yet not be a merchant and not involving buying and selling. For instance, it would be quite possible for a Chinese to run a lodging house or laundry business of such magnitude that he would perform no manual labor of any description, yet it does not seem that he could properly be classed as a merchant by reason of that fact.

Judge Neterer also referred to the construction placed upon the word "merchant" by the Department as being more comprehensive than the meaning given by lexicographers, and referred to a banker being classed as a merchant. Whether or not a banker should be classed as a merchant does not appear in any way to have any bearing on this case, and the Department's construction of the word "merchant" as applied in the present case, was fully set forth in the record which was before the court, although, of course, had Wong Chai Chong been assistant manager of the restaurant a full year before the respondent's arrival, such con-

struction would have been at variance with the Department's practice from 1915 until the decision of the *Mak Fou Cho* case was rendered and recognized as the law.

It is difficult to understand Judge Neterer's conclusion that the meaning of "merchant" in the *Toxaway Hotel* case "obviously has no application." He simply states a conclusion on this point, basing it on the provisions of the Exclusion Act and Department rule. Such conclusion might be justified as far as Department rule is concerned but Department rules cannot change the law and, furthermore, the Department rule at the time the respondent in this case applied for admission did not allow of a mercantile status for respondent's father, even had the record shown that Wong Chai Chong was assistant manager of a restaurant for one year or more prior to the arrival of the respondent.

A recent decision rendered by Judge Bourquin on December 6, 1924, in the case of *Geung Wah Yu*, No. 18485 in the District Court for the Northern District of California, states:

"To dispose of this application it suffices to say that a keeper of a restaurant who only incidentally sells cigars, is not a 'merchant' within the meaning of the Chinese Exclusion Act. In said Act it has

the ordinary meaning likewise defined in the act which usage does not attach to restaurant proprietors. In re U. S. v. Davis, Dist. Col., April, 1924. Dismissed."

It is, therefore, submitted that the appeal should be sustained and the judgment of the District Court reversed for the following reasons:

1st. Respondent's father, Wong Chai Chong, is not a merchant, for the reason that he was not assistant manager of the Wong Kew Restaurant for a year prior to the arrival of the respondent at this port.

2nd. If he had been assistant manager of said restaurant for a year prior to respondent's arrival, Wong Chai Chong would not be entitled to the status of a merchant within the meaning of the Act of November 3, 1893.

Respectfully submitted,

THOS. P. REVELLE,
United States Attorney,
DONALD G. GRAHAM,
Assistant United States Attorney.

In the

United States Circuit Court of Appeals

For the Ninth Circuit 3

No. 4522.

LUTHER WEEDIN, as Commissioner of Immigration at the Port of Seattle, Washington, Appellant

vs.

WONG JUN, Appellee.

Appeal from the United States District Court for the Western District of Washington, Northern Division.

Honorable Jeremiah Neterer, Judge

Brief of Appellee

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In the

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Brief of Appellee

STATEMENT OF THE CASE

Wong Jun, appellee, applied for admission at the Port of Seattle on July 9, 1924, as the dependent unmarried daughter of Wong Chai Chong, a domiciled Chinese merchant.

The right of appellee to be admitted to the United States under the Immigration Act of 1924 may await the decision of the Supreme Court of the United States in cause No. 769 therein, entitled *Cheung Sum Shee, et al., vs. John D. Nagle,* for the reason that the United States Circuit Court of Appeals for this Circuit has therein certified that question of law for decision to the Supreme Court of the United States.

The right of appellee to be admitted to the United States under the Chinese Exclusion Laws prior to the 1924 Act is here the question for decision. Judge Neterer, in the District Court, granted the Writ of Habeas Corpus herein and ordered appellee discharged from the custody of the Commissioner of Immigration as being entitled to be admitted to the United States under both the Immigration Act of 1924 and prior Chinese Exclusion Laws, from which order the Commissioner of Immigration appeals.

The facts in this case are agreed. The sole question for this Court to decide is a question of law, the question to be decided being: Is the father of appellee a merchant within the provisions of the Chinese Exclusion Act?

The testimony of witnesses taken by the Immigration officials, said testimony being an exhibit in this case, shows the undisputed facts regarding the father of appellee to be, that he was admitted to the United States from China at the Port of San Francisco on September 15, 1910, presenting at that time a Section Six certificate issued to him by the Government of China, under the Treaty of 1880 (22 Stat. 826) and the Act of 1882, as amended by the Act of 1884 (23 Stat. 115); that he has maintained his status as a merchant in this country for the past fifteen years and that he has never been a laborer within the meaning of said Chinese Exclusion Laws since his admission to the United States in 1910; that the immigration service has always recognized him as a merchant and has admitted two of his minor sons from China to the United States, namely, Wong Jung in the year 1914 (Exhibit here in San Francisco File 13627/11-2), and Wong Chong in the year 1921 (Exhibit in this case San Francisco File No. 19981/17-25).

The said testimony further shows that during the past four or five years the father of appellee has been connected with, as a part owner of, the Wong Kew Restaurant, at 1205-7-9 Market Street, Philadelphia, and at no time during his connection

with said restaurant has he performed any labor therein, but that his duties at all times have been in connection with the ownership and mercantile character of said business. He was the treasurer of said company until September, 1923, at which time he became the assistant manager thereof, which position he has continued to hold up to the present time, and that since September, 1923, his duties have been entirely in connection with the management of said Wong Kew Restaurant Company.

The testimony and record further show that said Wong Kew Company is one of the largest and among the leading Chinese restaurants in the United States, occupying the second and third floors of the premises above described, which company transacts from $130,000.00 to $140,000.00 of business yearly, the furnishings and equipment being worth the sum of $140,000.00, on which they carry insurance in the sum of $70,000, the monthly rental paid for said premises being $1,125.00.

The above and foregoing facts are contained in the record on file herein and are conceded.

ARGUMENT

The question of law for the Court here to decide is: Is the part owner of a large Chinese restaurant,

who performs no labor in connection with the non-mercantile end thereof, but whose duties are entirely in connection with the management of said business, a "merchant" or a "laborer" within the meaning of the Chinese Exclusion Law, *supra?* The District Court below, Ex Parte Wong Jun, 3 F. (2d) 502, held that he is a merchant. Judge Neterer in his opinion said:

"A manager may be said to be one who has general control over and conducts and directs the affairs of a concern, and has knowledge of all its business and property, and who can act in emergencies on his own responsibility. It affirmatively appears in the record that the father is assistant manager; in the absence of the manager has entire control of the concern. He does no manual labor. He orders goods, oversees and directs the business in the absence of the manager and assists him when he is present. * * *

"By the same token the manager or assistant manager of a restaurant, who performs no manual labor, is a "merchant". It seems obvious that the purchasing of supplies and selling them cooked, if the party does not do the manual labor of preparing them or serving them, is as truly merchandising as selling goods over the counter, or receiving money on deposit and selling exchange or discounting commercial paper."

Years ago and before the Chinese restaurant business had evolved into its present magnitude,

and general high class character, when the owners of small Chinese restaurants cooked and served the food in their own place of business, the immigration service and the courts held that the Chinese proprietor of such a restaurant who performed such manual labor therein was a laborer and not a merchant within the meaning of the Chinese Exclusion Law. Such ruling and holding at that time under such facts was no doubt within good reason and law; but of recent years the immigration service and the courts have recognized the expanse of the Chinese restaurant business to such an extent that they have in many cases uniformly held that one engaged exclusively in the management of the mercantile end of a large Chinese restaurant was a merchant within the meaning of the Chinese Exclusion Laws. This ruling and practice has been followed by the immigration service since the decision of Judge Hough in the year 1915 in the District Court for the Southern District of New York, in an unpublished opinion rendered in the case of the *United States vs. Choy Ying.* The court therein said:

"There is a second contention here presented that the applicant is himself a merchant, the government holding that one who keeps a restaurant is a laborer.

"It is undoubtedly true that one may own a restaurant and yet be a laborer, as for instance, if he cooks and serves food even in his own shop. But it seems to be equally obvious that there is a side or department of the restaurant business that is just as truly merchandising as selling goods over a counter, *i. e.*, the purchasing of supplies and the selling of the cooked food produced.

"The evidence is uncontradicted that this was the kind of business that the appellant did as long as he was able to work.

"I am therefore of the opinion that both as the son of a merchant and as a merchant himself, the appellant is entitled to remain in the United States and the order of deportment is reversed."

Here the mercantile character of the growing Chinese restaurant business appears for the first time to have been made, in terms, the subject of judicial announcement. In a recent unreported case in the United States District Court, for Northern District of California, Judge Kerrigan discharged from custody Chin Jack Fong, the minor son of a restaurant proprietor. A similar decision was rendered by the Circuit Court of Appeals for the Second Circuit, holding the manager of a Chinese restaurant to be a merchant. That part of the opinion is as follows:

"Chin Wee, a Chinese person who came to this country about 1869 and was living in San Fran-

cisco at the time, testified that Chin Hing, who was an uncle of the witness, was the proprietor of a restaurant in that city, the witness working for him in the restaurant. Chin Hing therefore belongs to the merchant class, and any minor son whom he might bring to San Francisco with him would—by attribution of status—come within the same class." Lee Chee vs. United States, 224 Fed. 447.

As a result of these two later decisions the immigration service, which had been ruling to the contrary, basing past policy on the case of Ah Yow, 59 Fed. 561, decided 30 years ago, and the case of Chung Ki Foon, 83 Fed. 143, cited in appellee's brief herein, changed its view and the last two decisions rendered over twenty years ago were no longer followed. The immigration service thereafter adopted the ruling in the Choy Ying and Lee Chee cases that the management of modern Chinese restaurants is mercantile. However, a reading of the Ah Yow case shows that the keeper of that restaurant was "one who keeps a place for serving meals, provides, prepares and cooks raw material to suit the tastes of his patrons." The duties of petitioners in the Ah Yow and Chung Ki Foon cases, as Judge Neterer says, are not limited as here, and therefore cannot be authority. Following Judge Hough's decision, supra, the immi-

gration service adopted the policy of granting a mercantile status to the part owners of large Chineses restaurants engaged strictly in the management of the mercantile end thereof. Discussing Judge Hough's decision the immigration service, in a letter in its file No. 53874/7 says:

"So long as it was clearly shown that the Chinese was engaged personally in that end of the business which consisted in buying and selling merchandise at a fixed place, the attachment to the business of a manufacturing industry could not operate to deprive such a Chinese of his mercantile status * * * ."

adding that:

"It is apprehended that the restaurant business as *now conducted* by Chinese in some of the larger cities does not differ in any material or substantial manner from business of the kind just mentioned."

And further, referring directly to Judge Hough's decision, this same letter states:

"The Bureau has no criticism to offer with respect to the holding of Judge Hough with respect to the second question of law involved in the case, and as that question is determinative of the entire matter, it would not suggest the taking of an appeal."

In a later official communication of the Department of Labor to the Commissioner of Immi-

gration at Seattle, date February 16, 1916, file No. 54133/9, it was frankly admitted that the former conclusion that a restaurant keeper is a laborer "has been predicated on the assumption that as is usually the case, the restaurant keeper himself prepares and serves the food or takes some other part in the manual labor, necessary to the maintenance of a restaurant * * *. But there is a buying and selling phase of the running of a restaurant that is clearly mercantile in character, and where one is engaged solely in that part of the business it does not seem logical to hold that he is a laborer * * *."

And the Bureau held that the restaurant proprietor in that case was entitled to be regarded as a merchant, "as it is clearly shown that his connection with the business has been of a mercantile nature, and his duties therein have not included the performance of any labor in connection with the non-mercantile end thereof."

The above is a clear recognition of the fact that the Ah Yow and Chung Ki Foon decisions, supra, can only be justified on the theory that the petitioners in those cases themselves performed the manual labor necessary in the preparation of foods in their restaurants, and can constitute no authority for the proposition that a restaurant owner who,

like appellee's father, performed no manual labor, is not a merchant.

It should not be necessary to here set out at any length the well-established proposition of law that the Chinese Exclusion laws are directed only against the laboring classes. Judge Ross, in Ah Fawn, 57 Fed. 591, recites in full all of the preliminary negotiations leading up to the Treaty of 1880, supra, and recited that said laws were not intended to exclude those "who went to the United States for the purpose of teaching, study, *mercantile transactions*, travel or curiosity."

Justice Field, in the "*Case of the Chinese Merchant*," 13 Fed. 605, said:

"The Act, conforming to the supplementary treaty, is aimed against the immigration of 'Chinese laborers'—not others";

and in regard to the Treaty of 1880 says:

"It provides, in express terms, as seen above, that the limitation or suspension shall apply only to them, 'other classes not being included in the limitations.' ".

Justice McKenna, in the Circuit Court of Appeals, this Circuit, in the case of *Lee Kan vs. United States*, 62 Fed. 914, held that the exclusion features of the Treaty of 1880 and the Chi-

nese Exclusion Laws were for the purpose of excluding Chinese laborers—not others.

Congress, in the Act of November 3, 1893, (28 Stat., L. 7), amended the Act of May 5, 1892, for the purpose of more accurately defining the term "Chinese laborer," making the term more comprehensive than theretofore, and defined the word "laborer," as follows, to mean:

"Both skilled and unskilled manual laborers, including Chinese employed in mining, fishing, huckstering, peddling, laundrymen, or those engaged in taking, drying or otherwise preserving shell or other fish for home consumption or exportation";

and in the same Act Congress defined the word "merchant" as follows:

"The term 'merchant,' as employed herein and in the acts of which this is amendatory, shall have the following meaning and none other: A merchant is a person engaged in buying and selling merchandise, at a fixed place of business, which business is conducted in his name, and who during the time he claims to be engaged as a merchant, does not engage in the performance of any manual labor, except such as is necessary in the conduct of his business as such merchant."

In this Circuit Judge Gilbert, in 184 Fed. 687, in one paragraph of the opinion in that case gave

expression to the proper intention of Congress in designating the class of business men entitled to privileges under the Chinese treaty and Exclusion Laws, as distinguished from the class of Chinese who are laborers, and therefore not entitled to such rights under said treaty and laws. Judge Gilbert there expressed the idea that there was a laboring end to certain kinds of business, and that there was a mercantile end to the same business, and that those Chinese who were identified with the laboring end of that business must be classed as laborers under the 1893 Act, supra, and those Chinese who are engaged exclusively in the mercantile end of such business are the ones designated as "merchants" in said Act. In other words, the Court there made a distinction, in interpreting said 1893 Act in these words:

"Between merchants who buy and sell goods at a fixed place of business, and all those who sell goods which are the product of their own labor, or who sell goods which they have produced to vend at no fixed place of business."

In this Circuit Justice McKenna also aptly expressed the same idea in the case of *Lai Moy vs. United States*, 66 Fed. 955, when he said:

"It will be observed that the definitions of the act are very careful and confined, and we may not enlarge them. The designation 'merchants' does

not include, comprehensively, all who are not laborers, but strictly 'a person (to quote the act) engaged in buying and selling merchandise.' To fabricate merchandise, as appellant did, is not to buy and sell it. Nor may both be done, for the 'merchant' may not (again to quote the act) 'engage in the performance of any manual labor except such as is necessary to the conduct of his business as such merchant,'—that is, in buying and selling merchandise; and the manual labor which is precluded is skilled as well as unskilled. One-half of appellant's time was engaged in cutting and sewing garments. This was manual labor not necessary in the buying and selling of merchandise. If we may indulge this, we may indulge more, and all artificers would be excluded from the act provided they worked for themselves or mingled with their proper work any traffic in merchandise."

Applying this reasoning to our large modern Chinese restaurants, one of the owners thereof could not both manage the restaurant and do the manual labor necessary in preparing and serving and be entitled to be classed as a merchant within the meaning of the Chinese Treaty and Exclusion Laws, but if he confines his business strictly to the management of said restaurant, then he is entitled to be classed as a merchant, for the reason that he employs others to do the labor in connection with the preparation and serving in the restaurant,

which is not necessary in the conduct of the mercantile end of his restaurant business.

Judge Gilbert, in this Circuit, in the case of *Lee Ah Yin vs. United States*, 116 Fed. 614, discussed the meaning of the term "laborer" and "merchant" in the light of the Act of 1893, supra. The court there said that the Act was amended because there were:

"Certain occupations which were upon the border line between the occupation of laborer and that of merchant, and which in some aspects might be regarded as belonging to the merchant class. The occupation of mining, taking fish for the purpose of selling, peddling, operating a laundry, etc., partake of some of the characteristics of the occupation of the merchant, and those engaged therein might in a sense be deemed merchants. Evidently it was to define these specific occupations, and to dcelare that persons engaged therein are not merchants, that the act was adopted."

Therefore, it must be concluded that if Congress intended that one connected with the management of a large Chinese restaurant to be a laborer and not a merchant within the meaning of said law, it would have included the term "restaurant proprietor" along with the term "laundrymen," etc., when it enlarged the scope of the word "laborer" in said Act. If the management of a restaurant

was to be laboring within the meaning of said Act, Congress would have so stated, for the reason that it was well known that Chinese people were generally engaging in the restaurant business.

Mercantile Pursuits Under Bankruptcy Law

Appellant cites the Supreme Court of the United States in the case of *Toxaway Hotel Co. vs. J. C. Smathers & Company*, 216 U. S. 439, and in re *Wentworth Lunch Company*, 159 Fed. 413, affirmed by the Supreme Court in a *per curiam* decision in 217 U. S. 591, wherein the Supreme Court of the United States held that the business of conducting an inn or a restaurant is not a "mercantile pursuit" within the meaning of the Bankruptcy Act that would permit the proprietor thereof to become an involuntary bankrupt. Such decisions can by no method of reasoning be considered authority to decide what the Chinese Exlusion Laws and the Treaty between China and the United States mean in defining the class of business men or merchants, as distinguished from laborers, that are entitled to come to the United States from China. Judge Neterer, in this case, expressed such a view, stating:

"The restricted meaning of 'merchant' under the Bankruptcy Act,—Toxaway Hotel Co. vs. Smath-

ers & Co., 216 U. S. 439,—in view of the provisions of the Exclusion Act and department rule, obviously has no application."

The meaning of the term "mercantile pursuits" for the purpose of the Bankruptcy Act and the term "merchant" or "business man" within the meaning of the Chinese Treaty and Exclusion Laws are entirely different in their application. The Bankruptcy Act is limited to certain kinds of business. It excludes bankers. The Chinese Treaty and Exclusion Laws do not confine the term "merchant" to any particular line of business, but include all lines of business for the purpose of distinguishing a business man entitled to be admitted to the United States, from the laborer who is excluded from admission.

U. S. Ex Rel. Mak Fou Cho vs. James J. Davis Secretary of Labor

The above case reported in Washington Law Reporter, Vol. 52, No. 20, page 306, decided in April, 1924, by Judge McCoy, in the Supreme Court of the District of Columbia, sitting as District Court, is depended on by the appellant in this case and on said decision apparently rests his hope of reversing the District Court herein, for he states that said decision is "directly in point and con-

trolling." It will only be necessary for this court to read Judge McCoy's entire opinion, and not just that portion quoted in appellant's brief, in order to conclude that said case is not directly in point; but on the contrary said opinion states that it was the past practice and the then policy of the immigration service to recognize as merchants within the meaning of the Chinese Exclusion Laws owners of restaurants who are engaged in the management thereof; and that the facts in said case were that the petitioner therein took no part in the mercantile end of the restaurant business, and that none of his duties were in connection with the general management thereof. In the instant case the record proves, and it is conceded that the father of appellee is the assistant manager of the Wong Kew restaurant, but in the Davis case, relied upon by appellant, the facts were found to be just the contrary. In other words, in the instant case it is conceded that the father of appellee is the assistant manager of his restaurant, whereas in the Davis case, relied upon by appellant, the Secretary of Labor found, and Judge McCoy ruled that Mak Fou Cho was the part owner of the Celestial restaurant in Baltimore and performed the duties of cashier in the day time, and on rare occasions, in addition, assumed the duty of head waiter or superintendent of the

dining room, but that he had no real part in the management of the business. On that point Judge McCoy, in said opinion, held:

"The ruling of the Department in cases in which has come into question the status of persons engaged in the restaurant business is the buying and selling and general managerial work in a restaurant are mercantile, and that a partner who conducts that part of the business is entitled to be considered a merchant. In the present case testimony has been taken, and on it the finding is that the petitioner takes no part in the buying and selling, and that his powers are not those of an assistant general manager."

The Secretary of Labor, in the *Davis or Mak Fou Cho* case, took the following position (and if applied to the case now before Your Honors, it would amount to a confession of the correctness of Judge Neterer's opinion in the instant case), and we quote from respondent's brief in said Davis case, page 3 thereof:

"The respondent further held that a restaurant is not a mercantile establishment, but that the buying, selling and general managerial work of a restaurant are mercantile in their nature. Respondent held, however, that as the petitioner was merely the bookkeeper and cashier in the restaurant and had no real part in the managing of the business, he was not a merchant within the meaning of the Chinese Exclusion Act."

The *Davis*, or *Mak Fou Cho* case, therefore, is not in point with the instant case, for in the instant case it is conceded that the duties of the father of appellee are those of an assistant general manager, whereas in the *Davis*, or *Mak Fou Cho* case, the immigration service and Judge McCoy found that the duties of Mak Fou Cho were not those of an assistant general manager. Judge Neterer, in his opinion in the instant case, recognized this distinction when he said therein:

"This case is clearly distinguished from the Mak Fou Cho case, *supra*. Chief Justice McCoy in that case said the petitioner * * takes no part in buying and selling and that his powers are not those of an assistant manager. The Department has, I understand, uniformly held heretofore that an assistant manager * * * is classed as a merchant. Two minor sons of the petitioner have heretofore been admitted and are now in the United States";

and on this latter point it must be conceded that the record shows that one of these sons was admitted to the United States in 1921 upon the status of the father of appellee as a merchant, based upon his connection with this Wong Kew restaurant with which he is still connected.

The *Mak Fou Cho case, supra*, was a petition to mandamus the Secretary of Labor to issue a mer-

chant's return certificate to Mak Fou Cho, and Judge McCoy mentioned the *Toxaway Hotel case, supra,* not for the purpose of holding that Mak Fou Cho was not a merchant, but for the purpose of showing that the respondent therein had not acted arbitrarily to such an extent that the Writ of Mandamus should issue. In that case the petitioner also had another adequate remedy at law, and naturally the Writ of Mandamus for that additional reason would not lie. Judge McCoy held that the Secretary of Labor had not acted arbitrarily or capriciously, his duty in the issuance of return certificates not being purely ministerial. The Secretary of Labor in refusing a return certificate to Mak Fou Cho as a merchant followed the reasoning and decision of Judge Hough, *supra,* for the Secretary of Labor at that time would have granted the return certificate had the facts shown that Mak Fou Cho was connected with the management of the Celestial Restaurant, as Wong Chai Chong is connected with the management of the Wong Kew Restaurant.

The fact that the immigration service now using the *Davis,* or *Mak Fou Cho case, supra,* as authority, reverts back to this old ruling abandoned in 1915, after Judge Hough's decision, is not controlling on the courts for the reason, as pointed out

above, the decision of Judge McCoy, *supra*, gives no reason for and is no authority for changing the policy of the Department of Labor; and it only shows on its face that the Bureau of Immigration has misinterpreted and misunderstood and is misapplying the decision of Judge McCoy in that case. Judge McCoy does not hold contrary to Judge Hough.

Appellant mentions a decision rendered by Judge Bourquin on December 6, 1924, in the case of *Geung Wah Yu*, No. 18485, in the District Court for the Northern District of California, wherein the court follows the *Davis case, supra.* The facts in the *Geung Wah Yu case* are not set forth in the opinion, and therefore it is not known whether the keeper of that restaurant performed any of the labor in preparing and serving the food or not, but, in any event, sufficient has been said in the discussion of the *Davis case, supra*, to show that it is not authority on the question of the mercantile status of the manager of a restaurant, and, therefore, no matter what the facts may be in the case decided by Judge Bourquin, his decision cannot be followed in the instant case now before this Court for decision.

Appellee's Father Has Always Maintained a Mercantile Status Since His Admission in 1910

Wong Chai Chong, appellee's father, purchased an interest in the Wong Kew Restaurant in 1920, becoming the cashier and treasurer thereof at that time. In September, 1923, he became the assistant manager thereof, and he has confined himself in a managerial capacity in connection with the mercantile end of said business up to the present time. It should be borne in mind that Wong Chai Chong, appellee's father, was a merchant in China, and was admitted to the United States as a merchant in possession of a Section Six certificate in 1910. Nowhere is it shown that at any time since 1910 has he abandoned his mercantile status, and yet appellant, at the bottom of page 17 of his brief, takes the position that as appellee arrived at the Port of Seattle on July 9, 1924, and as her father did not become the assistant manager of the business until September, 1923, that therefore she is not admissible for the reason that her father had not been such assistant manager for one year prior to her arrival at the Port of Seattle.

In the first place the law does not say that the father must have been a merchant in the United

States for a period of one year in order that he may have his minor or dependent children join him in this country. The law states that when a merchant has returned to China, or where a merchant asks for a "*pre-investigation*" of his status in contemplation of a visit to China, and desires to return to the United States, he must then show, in order to secure his own readmission, that he has been a merchant in the United States for at least one year immediately prior to his return to China, but the law does not require a domiciled merchant in the United States to have maintained that status here for one year in order to bring his family into the United States from China to join him and his domicile. However, the appellee herein contends that her father has maintained an exempt mercantile status from the year 1910, when he was admitted, up to the present time.

The immigration service at Seattle did not pass upon the mercantile status of Wong Chai Chong until November 21, 1924, which was four months after appellee arrived in the United States, and practically fifteen months after Wong Chai Chong assumed the duties of assistant manager of the Wong Kew Restaurant. His duties in connection with the restaurant, however, even prior to Sep-

tember, 1923, were as cashier and treasurer, and as cashier and treasurer in 1921, the immigration service admitted one of the minor sons to the United States.

It will thus be seen that the father of appellee was the assistant manager of his restaurant for a period of fifteen months prior to the date that the immigration service finally passed on his mercantile status, and also, in view of the fact that appellee's father was admitted to the United States in 1910 as a Section Six merchant, and that he has evidently maintained a mercantile status ever since, this court should not reverse the District Court and declare appellee inadmissible in the light of these facts simply for the reason that he had been the assistant manager only one year prior to September, 1924, whereas appellee arrived at the Port of Seattle on July 9, 1924, when, as a matter of fact, he had actually been assistant manager of said restaurant for a period of fifteen months prior to the decision of the immigration service on the question of his mercantile status. He has now been the assistant manager of that restaurant for a period of twenty-one months, or nearly two years, and if appellant's wish, as outlined in his brief, that appellee should be deported because her

father had not been the assistant manager of the restaurant for a whole year prior to her arrival in this country is followed, then a useless, vain and unnecessary thing would have to be done by her. The unjust and absurd situation would arise whereby she would simply return to China and come back again and be admitted. In the case *of Tsoi Sim vs. United States*, 116 Fed. 920-923, this court held that the doing of a vain thing is to be avoided, and said:

"If appellant was to be deported, she would have the unquestionable right to immediately return and would be entitled to return and remain in this country upon the sole ground that she is the lawful wife of an American citizen."

The Court, therefore, properly refused to deport a woman who might so easily and properly re-enter.

"Nothing is better settled than that statutes should receive a sensible construction such as will effectuate the legislative intent, and, if possible, so as to avoid an unjust or an absurd conclusion."

Lau Ow Bew, 144 U. S. 47; 36 L., Ed. 340.

Church of Holy Trinity vs. United States, 143 U. S. 457.

The appellee herein will be twenty-one years of age on August 20, 1925, but even if she had to return to China and come back again and could

not make her return here within that time, she would still be admissible for the reason that under the rules of the Department of Labor for the admission of the families of exempt merchants only the sons have to be minors, and if they are over twenty-one years of age they are not admissible; but in regard to the daughter of an exempt merchant, she is admissible, even though not a minor, if she is unmarried, the theory of the rule being that "dependent members of the household of a member of the exempt classes may enter," and in Rule 9, Subd. C, page 29, of the Department's rules governing such cases, it is stated in this respect:

"In the absence of evidence to the contrary, it shall be assumed that a wife or unmarried daughter is a member of the household of the husband or father";

and, in the next subdivision, the age limit for male children is fixed at twenty-one years.

It is therefore submitted that this appeal should be dismissed and the judgment of the lower Court sustained.

Respectfully submitted,

HUGH C. TODD,

Attorney for Appellee.

No. 4523

United States

Circuit Court of Appeals

For the Ninth Circuit.

Transcript of Record.

(IN TWO VOLUMES.)

JOSEPH E. MARRON and GEORGE BIRDSALL,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

JOSEPH GORHAM,
Plaintiff in Error,

vs.

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Defendant in Error.

PATRICK KISSANE,
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vs.

UNITED STATES OF AMERICA,
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VOLUME I.

(Pages 1 to 352, Inclusive.)

Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, First Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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Defendant in Error.

PATRICK KISSANE,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

VOLUME I.

(Pages 1 to 352, Inclusive.)

Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, First Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

For Defendants, Joseph E. Marron and George Birdsall:

HUGH L. SMITH, Esq., and CHARLES J. WISEMAN, Esq., San Francisco, Cal.

For Defendant, Patrick Kissane:

JOSEPH L. TAAFFE, Esq., San Francisco.

For Defendant, Joseph Gorham:

WILLIAM A. KELLY, Esq., San Francisco.

For Plaintiff:

UNITED STATES ATTORNEY, San Francisco.

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 15,708.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE HAWKINS, WALTER BRAND, JOSEPH E. MARRON, *alias* EDDIE MARRON, GEORGE BIRDSALL, *alias* GEORGE HOWARD, CHARLES MAHONEY, PATRICK KISSANE and JOSEPH GORHAM,

Defendants.

PRAECIPE FOR TRANSCRIPT OF RECORD ON WRITS OF ERROR.

To the Clerk of Said Court:

Sir: Please prepare certified transcript on writs of error of Joseph E. Marron, George Birdsall, Patrick Kissane, and Joseph Gorham of the following pleadings, papers and orders:

1. Indictment.
2. Verdict of Jury.
3. Motions and arrest of judgment.
4. Motions for new trial.
5. Sentence of judgment.
6. Bill of exceptions as settled by Trial Judge.
7. Petition for writ of error of:
    a. Joseph E. Marron.
    b. George Birdsall.
    c. Patrick Kissane, and
    d. Joseph Gorham. [1*]
8. Order allowing writ of error for:
    a. Joseph E. Marron.
    b. George Birdsall.
    c. Patrick Kissane, and
    d. Joseph Gorham.
9. Assignment of errors of:
    a. Joseph E. Marron.
    b. George Birdsall.
    c. Patrick Kissane, and
    d. Joseph Gorham.
10. Bond of costs of:

*Page-number appearing at foot of page of original certified Transcript of Record.

a. Joseph E. Marron.
b. George Birdsall.
c. Patrick Kissane, and
d. Joseph Gorham.

11. Writ of error on behalf of:
    a. Joseph E. Marron.
    b. George Birdsall.
    c. Patrick Kissane, and
    d. Joseph Gorham.
12. Citation on writ of error on behalf of:
    a. Joseph E. Marron.
    b. George Birdsall.
    c. Patrick Kissane, and
    d. Joseph Gorham.
13. Praecipe for certified transcript.
14. Supersedeas bond on behalf of:
    a. Joseph E. Marron.
    b. George Birdsall.
    c. Patrick Kissane, and
    d. Joseph Gorham.
15. Motion to quash indictment on behalf of:
    a. George Birdsall, and [2]
    b. Charles Mahoney.
16. Petition to suppress evidence, on behalf of George Birdsall.
17. Plea in bar and petition to suppress evidence on behalf of George Birdsall.
18. Motion to quash indictment on behalf of Joseph Marron, and George Birdsall.
19. Petition for return of property and exclusion of evidence, on behalf of George Birdsall and Charles Mahoney.

20. Plea in bar and motion to suppress evidence on behalf of Joseph Marron.
21. Petition to suppress on behalf of Joseph E. Marron.
22. Petition to suppress on behalf of Joseph Marron.
23. Amended petition to suppress evidence on behalf of George Birdsall and Charles Mahoney.
24. Affidavits of:
    a. A. R. Shurtleff.
    b. W. F. Whittier.
    c. R. W. Rinckel.
    d. Perry Eyre.
25. Order for transfer of original exhibits.
26. Order that one engrossed bill of exceptions may be used on writ of errors.

Dated Feb. 6th, 1925.

HUGH L. SMITH,
CHAS. J. WISEMAN,
Attorneys for Joseph E. Marron and George Birdsall. [3]

JOS. L. TAAFFE,
Attorney for Patrick Kissane.
WILLIAM A. KELLY,
Attorney for Joseph Gorham.

[Endorsed]: Filed Feb. 6, 1925. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [4]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 15,708.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE HAWKINS, WALTER BRAND, JOSEPH E. MARRON, *alias* EDDIE MARRON, GEORGE BIRDSALL, *alias* GEORGE HOWARD, CHARLES MAHONEY, PATRICK KISSANE and JOSEPH GORHAM,

Defendants.

INDICTMENT.

At a stated term of said court begun and holden in the city and county of San Francisco within and for the Southern Division of the Northern District of California on the second Monday in July in the year of our Lord one thousand nine hundred and twenty-four—

The Grand Jurors of the United States of America within and for the Southern Division of the Northern District of California on their oaths do allege, find, charge and present:

I.

That heretofore, to wit, on the 28th day of October, 1919, the Congress of the United States of

America passed an act entitled "An Act to prohibit intoxicating beverages and to regulate the manufacture, production, use and sale of high-proof spirits for other than beverage purposes, and to insure an ample supply of alcohol and promote its use in scientific research and in the development of fuel, dye, and other lawful industries," the short title of which is "National Prohibition Act," and which said act at all of the times hereinafter mentioned was and is now in full force and effect. [5]

II.

That under and pursuant to the provisions of the said act the Commissioner of Internal Revenue of the United States of America, with the approval of the Secretary of the Treasury of the United States, was and is authorized and empowered to make and prescribe regulations for carrying out the provisions of the said act.

III.

That the said Commissioner, with the approval of the said Secretary, heretofore, and on or about the 16th day of January, 1920, did make, prescribe and promulgate regulations entitled "Regulations relative to the manufacture, sale, barter, transportation, importation, exportation, delivery, furnishing, purchase, possession, and use of intoxicating liquor," approved January 16, 1920.

IV.

And the said Commissioner, with the approval of the said Secretary, heretofore, and on or about the 1st day of July, 1920, did make, prescribe, and pro-

mulgate modifications of regulations 60 entitled "Modification of Regulations No. 60 relative to the sale, use, transportation, delivery, and advertisement of intoxicating liquor," approved July 1, 1920.

V.

And the said Commissioner, under and pursuant to the authority conferred upon him by the said National Prohibition Act, as aforesaid, heretofore made, prescribed and promulgated records, applications for permits, permits, bonds, and forms to be used in and for the carrying out of the provisions of the said act, and which said records, applications for permits, permits, bonds, and forms of and for each thereof, respectively, were at all of the times herein mentioned required to be used in compliance with and in carrying out the provisions of the said act and said regulations, and at all of the times herein mentioned were in full force and effect. [6]

VI.

That under and pursuant to the provisions of said act and particularly by Section 1 of Title II thereof it is provided:

> "When used in Title II and Title III of this Act (1) The word 'liquor' or the phrase 'intoxicating liquor' shall be construed to include alcohol, brandy, whiskey, rum, gin, beer, ale, porter, and wine, and in addition thereto any spiritous, vinous, malt, or fermented liquor, liquids, and compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of 1 per centum or more of alcohol by volume which are

fit for use for beverage purposes; Provided, That the foregoing definition shall not extend to dealcoholized wine nor to any beverage or liquid produced by the process by which beer, ale, porter or wine is produced if it contains less than one-half of 1 per centum of alcohol by volume, and is made as prescribed in section 37 of this title, and is otherwise denominated than as beer, ale, or porter, and is contained and sold in, or from, such sealed and labeled bottles, casks, or containers as the Commissioner may by regulation prescribe.

(2) The word 'person' shall mean and include natural persons, associations, copartnerships, and corporations.

(3) The word 'commissioner' shall mean Commissioner of Internal Revenue.

(4) The term 'application' shall mean a formal written request supported by a verified statement of facts showing that the Commissioner may grant the request.

(5) The term 'permit' shall mean a formal written authorization by the Commissioner setting forth specifically therein the things that are authorized.

(6) The term 'bond' shall mean an obligation authorized or required by or under this act or any regulation, executed in such form and for such a penal sum as may be required by a court, the Commissioner or prescribed by regulation.

(7) The term 'regulation' shall mean any regulation prescribed by the Commissioner with the approval of the Secretary of the Treasury for carrying out the provisions of this act, and the Commissioner is authorized to make such regulations.

Any act authorized to be done by the Commissioner may be performed by any assistant or agent designated by him for that purpose. Records required to be filed with the Commissioner may be filed with an assistant commissioner or other person designated by the Commissioner to receive such records."

VII.

That under and pursuant to the provisions of the said act and particularly by Section 3 of Title II thereof, it is [7] provided that:

"No person shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish, or possess any intoxicating liquor except as authorized in this act, and all the provisions of this act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.

Liquor for nonbeverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished and possessed, but only as herein provided, and the

Commissioner may, upon application, issue permits therefor."

VIII.

That under and pursuant to the provisions of the said act and particularly by Section 6 of Title II thereof, it is provided that:

"No one shall manufacture, sell, purchase, transport, or prescribe any liquor without first obtaining a permit from the Commissioner so to do, except that a person may, without a permit, purchase and use liquor for medicinal purposes when prescribed by a physician as herein provided, and except that any person who in the opinion of the Commissioner is conducting a *bona fide* hospital or sanitorium engaged in the treatment of persons suffering from alcoholism, may, under such rules, regulations, and conditions as the Commissioner shall prescribe, purchase and use, in accordance with the methods in use in such institution, liquor, to be administered to the patients of such institution under the direction of a duly qualified physician employed by such institution * * * . Permits to purchase liquor shall specify the quantity and kind to be purchased and the purpose for which it is to be used. * * * No permit shall be issued to anyone to sell liquor at retail, unless the sale is to be made through a pharmacist designated in the permit and duly licensed under the laws of his state to compound and dispense medicine prescribed by a duly licensed physician. * * * Every permit

shall be in writing, dated when issued, and signed by the commissioner or his authorized agent. It shall give the name and address of the person to whom it is issued and shall designate and limit the acts that are permitted and the time when and place where such acts may be performed. No permit shall be issued until a verified, written application shall have been made therefor, setting forth the qualification of the applicant and the purpose for which the liquor is to be used.

"The commissioner may prescribe the form of all permits and applications and the facts to be set forth therein. Before any permit is granted the commissioner may require a bond in such form and amount as he may prescribe to insure compliance with the terms of the permit and the provisions of this title. * * * [8]

"Nothing in this title shall be held to apply to the manufacture, sale, transportation, importation, possession, or distribution of wine for sacramental purposes, or like religious rites, except section 6 (save as the same requires a permit to purchase) and section 10 hereof, and the provisions of this Act prescribing penalties for the violation of either of said sections. No person to whom a permit may be issued to manufacture, transport, import, or sell wines for sacramental purposes or like religious rites, shall sell, barter, exchange, or furnish any such to any person not a rabbi, minister of the

gospel, priest, or an officer duly authorized for the purpose by any church or congregation, nor to any such except upon an application duly subscribed by him, which application, authenticated as regulations may prescribe, shall be filed and preserved by the seller."

And the said Commissioner heretofore pursuant to the authority conferred upon him by said National Prohibition Act, did prescribe the form of all permits and applications and the facts to be set forth therein and did require a bond and prescribe the form thereof and did fix the penal amount of said bond; and the said applications for a permit, the permits, the bond and the requirements thereof at all of the times herein mentioned were and are now in full force and effect.

IX.

That under and pursuant to the provisions of said act and particularly by Section 10 of Title II thereof, it is provided that:

"No person shall manufacture, purchase for sale, sell, or transport any liquor without making at the time a permanent record thereof, showing in detail the amount and kind of liquor manufactured, purchased, sold or transported, together with the names and addresses of the persons to whom sold, in case of sale, and the consignor and consignee in case of transportation, and the time and place of such manufacture, sale, or transportation. The commissioner may prescribe the form of such record,

which shall at all times be open to inspection as in this act provided."

That the said Commissioner did prescribe and promulgate the record and form of said record and which said records and forms thereof so prescribed and promulgated at all of the times herein mentioned were and are now required to be made and kept as provided by and in said act and said Section 10 of said Title II thereof, and as provided by and in said regulations. [9]

X.

That under and pursuant to the provisions of said act and particularly by Section 13 of Title II thereof, it is provided that:

"It shall be the duty of every carrier to make a record at the place of shipment of the receipt of any liquor transported, and he shall deliver liquor only to persons who present to the carrier a verified copy of a permit to purchase which shall be made a part of the carrier's permanent record at the office from which delivery is made.

The agent of the common carrier is hereby authorized to administer the oath to the consignee in verification of the copy of the permit presented, who, if not personally known to the agent, shall be identified before the delivery of the liquor to him. The name and address of the person identifying the consignee shall be included in the record."

XI.

That under and pursuant to the provisions of said

act and particularly by Section 14 of Title II thereof, it is provided that:

> "It shall be unlawful for a person to use or induce any carrier, or any agent or employee thereof, to carry or ship any package or receptacle containing liquor without notifying the carrier of the true nature and character of the shipment. No carrier shall transport nor shall any person receive liquor from a carrier unless there appears on the outside of the package containing such liquor the following information:
>
> Name and address of the consignor or seller, name and address of the consignee, kind and quantity of liquor contained therein, and number of the permit to purchase or ship the same, together with the name and address of the person using the permit."

XII.

That under and pursuant to the provisions of said act and particularly by Section 15 of Title II thereof, it is provided that:

> "It shall be unlawful for any consignee to accept or receive any package containing any liquor upon which appears a statement known to him to be false, or for any carrier or other person to consign, ship, transport, or deliver any such package, knowing such statement to be false." [10]

XIII.

That under and pursuant to the provisions of

said act and particularly by Section 16 of Title II thereof, it is proveded that:

> "It shall be unlawful to give to any carrier or any officer, agent, or person acting or assuming to act for such carrier an order requiring the delivery to any person of any liquor or package containing liquor consigned to, or purporting or claimed to be consigned to a person, when the purpose of the order is to enable any person not an actual *bona fide* consignee to obtain such liquor."

XIV.

That under and pursuant to the provisions of said act and particularly by Section 21 of Title II thereof, it is provided that:

> "Any room, house, building, boat, vehicle, structure, or place where intoxicating liquor is manufactured, sold, kept, or bartered in violation of this Title, and all intoxicating liquor and property kept and used in maintaining the same, is hereby declared to be a common nuisance."

XV.

That under and pursuant to the provisions of the said act and particularly by Section 25 of Title II thereof, it is provided that:

> "It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this title or which has been so used, and no property rights shall exist in any such liquor or property. * * * "

XVI.

That under and pursuant to the provisions of the said act and particularly by Section 26 of Title II thereof, it is provided that:

> "When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors, found thereon being transported contrary to law. * * * "
> [11]

XVII.

That under and pursuant to the provisions of the said act and particularly by Section 33 of Title II thereof, it is provided that:

> "After Feburary 1, 1920, the possession of liquors by any person not legally permitted under this title to possess liquor shall be *prima facie* evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this title. * * * "

XVIII.

That by paragraph I of said "Modifications of Regulations No. 60" it is provided that:

> "No person holding permit authorizing the sale of intoxicating liquor may ship or deliver liquor pursuant to permit to purchase (Form 1410) except

(a) To the permittee named in Form 1410, if personally known to the vendee, or identified by some reputable person, personally known to him;

(b) To a *bona fide* employee of such permittee who is personally known to the vendor to be such employee, or who is identified by some reputable person personally known to the vendor; or

(c) To a person holding permit to transport intoxicating liquor for transportation to the permittee named in such form 1410, in accordance with paragraph 10 hereof. In all cases of shipment or delivery of intoxicating liquor under authority or permit to purchase (Form 1410), the vendor must indicate on the copy of such form retained by him, as well as on the copy to be forwarded by him to the director, the name of the person to whom delivery was made, stating whether such person is the permittee named in Form 1410, or such permittee's employee, or a carrier holding permit to transport, in which case the number of the transportation permit must be shown. If identification is necessary under the conditions stated above, the name and address of the person identifying the one to whom delivery was made must also be shown on both copies of Form 1410."

XIX.

That by paragraph 10 of said "Modifications of Regulations No. 60," it is provided that:

"No person holding a permit to transport intoxicating liquor may make delivery of any liquor transported by him, except at the point of destination indicated in Form 1410, covering the shipment, and to the consignee named in such form, or to the *bona fide* employee or an agent of such consignee authorized to accept delivery for him. No carrier may deliver any intoxicating liquor transported by him except upon receipt of copy of Form 1410 covering the same, verified under oath, with exceptions only as stated in Section 87 of Regulations No. 60. Such copy of Form 1410 must be filed by the carrier at [12] the office from which delivery was made, and must bear notation thereon of the name of the person to whom delivery was made and, in the event of identification by some other person, the name and address of such other person. Carriers are also required to keep records at the point of shipment, covering all intoxicating liquor transported by them, as provided in Section 6 of Regulations No. 60."

XX.

That by paragraph II of said "Modifications of Regulations No. 60," it is provided that:

"In order for any person holding a permit authorizing the procurement or delivery of intoxicating liquor, to be authorized to transport such liquor without the necessity of obtaining a permit to transport, within the contemplation of Section 83 of Regulations No. 60, it is

necessary that the transportation of such liquor be done by him personally, or by some person regularly and exclusively in his employ, and that the right to the possession of the vehicle used for such transportation be vested in such permittee."

XXI.

That by Section 1, Article I, of Regulations No. 60, it is provided that:

"(d) That words 'inside Commissioner' shall mean the Federal Prohibition Commissioner.

(a) The word 'Act' shall mean the Act of October 28, 1919.

(e) The word 'Director' or the phrase 'Federal Prohibition Director' shall mean the person having charge of the administration of Federal Prohibition in any state."

XXII.

That by Section 6 of Article III of said Regulations No. 60, it is provided that:

"All persons desiring to manufacture, sell, barter, transport, import, export, deliver, furnish, prescribe, purchase, possess or use intoxicating liquor, for the nonbeverage purposes herein authorized, must procure permits therefor in the manner hereinafter prescribed, except that no permit is required to be obtained under these regulations by a person operating an industrial alcohol plant, or a person using liquor in the manufacture of denatured alcohol or rum, who has obtained permit under regula-

tions No. 60; by persons procuring liquor for medicinal purposes upon prescriptions of physicians holding permits to prescribe; by rabbis, ministers of the gospel, priests, or officials duly authorized for the purpose by a church or congregation to procure its use or furnish wines for sacramental purposes or like religious rites; by persons to whom wine is furnished by such rabbis, ministers of the gospel, [13] priests, or officials for sacramental purposes, or like religious rites; or by persons owning warehouse certificates to cover possession of the distilled spirits covered thereby."

XXIII.

That by Section 8 of Article III of said Regulations 60, it is provided that:

"Persons desiring to procure any permit required by these regulations, other than permits to purchase, must submit applications for permit Form 1404, in triplicate, clearly setting forth all the data required by the regulations dealing with the particular class or classes into which they fall."

XXIV.

That by Section 14 of Article III of said Regulations 60, it is provided that:

"Where the same person operates several places of business for which he desires to obtain permits, a separate application must be filed and a separate permit procured covering each place of business, but only one bond need be filed covering all such places of business

operated by the same person within any one state."

XXV.

That by Section 15 of Article III of said Regulations 60, it is provided that:

"Every permit will clearly and specifically designate and limit the acts that are permitted, and the time when, and the place where, such acts may be permitted. All permits issued hereunder are nontransferable.

XXVI.

That by Section 20 of Article III of said Regulations 60, it is provided that:

"All persons desiring to obtain permits provided by these regulations (except as otherwise provided by Section 20) must at or before the time of filing application therefor, file with the Director a bond, in duplicate, on Form 1408, or Form 1409, to insure compliance with the provisions of this act and these regulations, as well as to cover any taxes and penalties which may be imposed under the Internal Revenue Laws."

XXVII.

That by Section 54 of Article VIII of said Regulations 60, it is provided that: [14]

"Any person entitled to procure intoxicating liquor in accordance with the provisions of these regulations must, in order to obtain such liquor, secure permits to purchase on Form 1410 from the Director, and no person is authorized to furnish or deliver intoxicatong li-

quor except upon receipt of permit to purchase, unless otherwise specifically provided in these regulations."

XXVIII.

That by Section 58 of Article IX of said Regulations 60, it is provided that:

"Any person who desires to obtain permit to sell intoxicating liquor in quantities of 5 wine gallons, or more, at the same time, for the nonbeverage purposes authorized, should file application on Form 1404 as prescribed in Article III. In filing application for permit such person should specifically set forth the kind and maximum quantity of liquor to be sold at any one time, or in case a person is lawfully in the possession of intoxicating liquor. and desire to obtain a permit to sell the same, he should state in his application the amount and kind of liquor so possessed.

In all cases it must be stated that such liquor will be sold by him only in wholesale quantities. Permits will not be issued to deliver any intoxicating liquor, produced under authority of Article VI, for conversion into nonalcoholic beverages.

(a) Permits to sell intoxicating liquor in quantities of less than 5 wine gallons may be obtained only by retail druggists or pharmacists, as set out in Article XII, provided, however, that when a person is engaged in business as both wholesale and retail druggist, he may obtain permit to sell intoxicating liquor in

both wholesale and retail quantities. All sales in retail quantities must be made through a pharmacist.

(b) Persons obtaining permits to deliver any intoxicating liquor in wholesale quantities may procure such liquors from other persons authorized to sell the same upon furnishing permits to purchase on Form 1410.

(c) Intoxicating liquor so procured by such persons may only be sold or furnished by them in wholesale quantities to other persons entitled to procure same, unless otherwise provided by the terms of the permit. Such dealers may furnish or deliver intoxicating liquor only upon receipt of permit to purchase, except in case of sacramental wines, where applications on Form 1412 are received, as hereinabove provided.

(e) All persons dealing in intoxicating liquor are required to keep record 52 and Supplementary Record 52, containing detailed entries, covering all receipts and deliveries of liquor by them, and to keep a permanent file, containing a copy of each permit to purchase, upon which deliveries of intoxicating liquor are made to or by them.

(f) All persons making sale of intoxicating liquor [15] in wholesale quantities are required to affix to the containers of such liquor a label, to be provided by them, bearing the following data:

(1) Name of manufacturer.
(2) Kind, quantity in wine gallons and proof contents.
(3) Name of seller.
(4) Date of sale.
(5) Name of purchaser.

(g) Such labels are subject to all the requirements of Article XVIII."

XXIX.

That by Section 80 of Article XV of said Regulations 60, it is provided that:

"All persons holding permits under these regulations to manufacture, sell, rectify, use or transport intoxicating liquor are authorized to possess intoxicating liquor, lawfully manufactured or procured by them, for the purpose and at the places designated in their respective permits.

(a) Intoxicating liquor may not be possessed by persons not holding permits under these regulations, or by persons holding such permits for other purposes, or at other places than authorized in their respective permits, except that intoxicating liquor lawfully procured by the owner thereof, prior to January 17, 1920, for beverage purposes, may be possessed in the private dwelling of such owner, where the same is occupied by him solely as his residence or place of abode, without the necessity of holding a permit, provided, such liquor is for the use only for the personal consumption of such owner and his family resid-

ing on such dwelling, and of his *bona fide* guests, when entertained by him therein."

XXX.

That by Section 83 of Article XVI of said Regulations 60, it is provided that:

"All permits authorizing the delivery or procurement of intoxicating liquor confer upon the permittee the right to have same transported by a carrier holding a permit to transport, or to transport such liquor by any method of delivery, from persons from whom he is authorized to receive such liquor or to persons to whom he is authorized to deliver the same at the place of business stated in the form of permit to purchase or application covering the shipment."

XXXI.

That by Section 84 of Article XVI of Regulations 60, it is provided that:

"Any person entitled to possess intoxicating liquor [16] for nonbeverage purposes may have any liquor which he possesses, transported from one place of business to another place of business covered by a permit held by him."

XXXII.

That by Section 87 of Article XVI of said Regulations 60, it is provided that:

"Persons holding permits to transport intoxicating liquor are authorized to deliver liquor transported by them at the point of destination only to the consignee named and only upon receipt from him of copy of form of

permit to purchase, Form 1410, verified under oath."

XXXIII.

That by Section 88 of Article XVI of said Regulations 60, it is provided that:

"Every person holding a permit to transport intoxicating liquor is required to permanently file, at the point of destination in a file or binder separate from other records, a copy of each form of permit to purchase or application upon which liquor is delivered by him, upon which copy should be noted the date when the liquor was delivered, and, in cases where delivered to an agent of the consignee, the name and address of such agent."

XXXIV.

That the defendants herein and hereinafter named were not nor was either or any of them at the time of entering into the conspiracy, combination, confederation, and agreement hereinafter set out, or at any of the times herein mentioned a physician, druggist, pharmacist or engaged in conducting a *bona fide* hospital or sanitarium engaged in the treatment of persons suffering from alcoholism under the direction of a duly qualified physician, and that the said intoxicating liquor herein and hereinafter mentioned, to wit, whiskey, containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes, was not and would not be purchased, possessed or transported by said defendants herein, or by either or any of them, for sacramental pur-

poses, or like religious rites, nor purchased, possessed, or transported by said defendants or either or any of them by prescription of physician holding permits to prescribe for medicinal purposes, nor were the said defendants herein and hereinafter named, or either or any of them at [17] any of the times herein mentioned conducting or operating under any permit, or at all conducting or operating any industrial alcohol plant or using any liquor in the manufacture of denatured alcohol or rum; that the said defendants, and each of them, at all of the times herein mentioned were persons who before purchasing, receiving, possessing or transporting any intoxicating liquor, as defined by said section 1 of Title II of said act, were required to make application for, give a bond and secure a permit from the Commissioner of Internal Revenue so to do as provided by the said act and said regulations hereinbefore set out; and the said defendants had not, nor had either or any of them at any of the times herein in this indictment mentioned made any application, given any bond, or secured any permit to purchase, possess or transport said or any intoxicating liquor as defined by said Section 1 of said Title II of said act; that the said defendants were not, nor was either or any of them exempt from making application, giving a bond and securing permits for the purpose, possession and transportation of intoxicating liquor as required and provided by said act and said regulations.

XXXIV(a).

And the Grand Jurors of the United States of America, within and for the Southern Division of the Northern District of California on their oaths do further allege, find, charge and present:

That the said defendant, JOSEPH GORHAM, was continuously throughout all of the time or times from and after the 1st day of March, 1924, and at all of the times thereafter, and herein mentioned, and particularly at the time or times of the commission and consummation of each and all of the overt acts in this indictment set forth, and up to and including the time of the filing of this indictment, then and there a duly and regularly qualified, appointed and acting sergeant of the police force of the city and county of San Francisco, State of California, then and there acting as such. [18]

XXXIV(b).

And the Grand Jurors of the United States of America within and for the Southern Division of the Northern District of California on their oaths do further allege, find, charge and present.

That the said defendant, Joseph Gorham, as such sergeant of police, was on or about the 1st day of March, 1924, and at all of the times thereafter and herein mentioned, and particularly at the time or times of the commission and consummation of each and all of the overt acts in this indictment set forth, and up to and including the time of the filing of this indictment duly and regularly assigned to and acting in the official capacity of his office as such sergeant of police in the Bush Street

Station, Police District No. 5, in the city and county of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this court.

XXXIV(c).

And the Grand Jurors of the United States of America, within and for the Southern Division of the Northern District of California, on their oaths do further allege, find, charge and present:

That the said defendant, PATRICK KISSANE, was continuously throughout all of the time or times from and after the 1st day of March, 1924, and at all of the times thereafter and herein mentioned, and particularly at the time or times of the commission and consummation of each and all of the overt acts in this indictment set forth, and up to and including the time of the filing of this indictment, then and there a duly and regularly qualified, appointed and acting police officer of the police force of the city and county of San Francisco, State of California, then and there acting as such. [19]

XXXIV(d).

And the Grand Jurors of the United States of America, within and for the Southern Division of the Northern District of California, on their oaths do further allege, find, charge and present:

That the said defendant, Patrick Kissane, as such police officer, was on or about the 1st day of March, 1924, and at all of the times thereafter and herein mentioned, and particularly at the time or times of the commission and consummation of each

and all of the overt acts in this indictment set forth, and up to and including the time of the filing of this indictment, duly and regularly assigned to and acting in the official capacity of his office as such police officer in the Bush Street Station, Police District Number 5, in the city and county of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this court.

XXXV.

And the Grand Jurors of the United States of America, within and for the Southern Division of the Northern District of California, on their oaths do further allege, find, charge and present: THAT

GEORGE HAWKINS, WALTER BRAND, JOSEPH E. MARRON, *alias* EDDIE MARRON, GEORGE BIRDSALL, *alias* GEORGE HOWARD, CHARLES MAHONEY, PATRICK KISSANE and JOSEPH GORHAM,

hereinafter called the defendants, did at and in the city and county of San Francisco, Southern Division of the Northern District of California, and within the jurisdiction of this court, on or about the 1st day of May, 1923, the real and exact date being to the said Grand Jurors unknown, and at all the times [20] thereafter up to and including the date of the filing of this indictment wilfully, unlawfully, feloniously and knowingly conspire, combine, confederate and agree together and with divers other persons whose names are to these Grand Jurors and to this Grand Jury unknown,

to commit the acts made offenses and crimes against the United States of America, that is to say, that the said defendants then and there being did then and there wilfully, unlawfully, feloniously and knowingly conspire, combine, confederate and agree together and with divers other persons whose names are to these Grand Jurors and to this Grand Jury unknown, with the intent to and for the purpose of:

(a) Wilfully, unlawfully, feloniously and knowingly manufacturing, selling, transporting, delivering, furnishing, and possessing intoxicating liquor for beverage purposes, to wit, whiskey, wine, champagne, gin and beer, containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes, in violation of Section 3 of Title II of the act of October 28, 1919, known as the National Prohibition Act;

(b) Wilfully, unlawfully, feloniously and knowingly purchasing, transporting, possessing, furnishing and selling intoxicating liquor for beverage purposes, to wit, whiskey, wine, champagne, gin and beer, containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes, without making any application therefor as required by the said National Prohibition Act or by said regulations and without first or at all obtaining a or any permit from the Commissioner of Internal Revenue so to do, in violation of Section 6 of Title II of the said National Prohibition Act and in violation of said Section 6 of Article III of said Regulations 60; [21]

(c) Wilfully, unlawfully, knowingly and feloniously maintain a common nuisance by keeping for sale and selling intoxicating liquor for beverage purposes, to wit, whiskey, wine, champagne, gin and beer, containing one-half of one per centum and more of alcohol by volume and fit for beverage purposes and in the building and place, to wit, 1249 Polk Street, in the city and county of San Francisco, in the Southern Division of the Northern District of the State of California, and within the jurisdiction of this court in violation of said Section 21 of said Title II of the said National Prohibition Act;

(d) Wilfully, unlawfully, knowingly and feloniously maintain a common nuisance by keeping for sale and selling intoxicating liquor for beverage purposes, to wit, whiskey, wine, champagne, gin and beer, containing one-half of one per centum and more of alcohol by volume and fit for beverage purposes and in the building and place, to wit, 2031 Steiner Street, in the city and county of San Francisco, in the Southern Division of the Northern District of the State of California, and within the jurisdiction of this court in violation of said Section 21 of said Title II of the said National Prohibition Act;

(e) Wilfully, unlawfully, knowingly and feloniously maintain a common nuisance by keeping for sale and selling intoxicating liquor for beverage purposes, to wit, whiskey, wine, champagne, gin and beer, containing one-half of one per centum and more of alcohol by volume and fit for beverage pur-

poses and in the building and place, to wit, 3047 California Street, in the city and county of San Francisco, in the Southern Division of the Northern District of the State of California, and within the jurisdiction of this court in violation of said Section 21 of said Title II of the said National Prohibition Act; [22]

(f) Wilfully, unlawfully, knowingly and feloniously maintain a common nuisance by keeping for sale and selling intoxicating liquor for beverage purposes, to wit, whiskey, wine, champagne, gin and beer, containing one-half of one per centum and more of alcohol by volume and fit for beverage purposes and in the building and place, to wit, 2922 Sacramento Street, in the city and county of San Francisco, in the Southern Division of the Northern District of the State of California, and within the jurisdiction of this court in violation of said Section 21 of said Title II of the said National Prohibition Act;

(g) Wilfully, unlawfully and knowingly selling intoxicating liquor for beverage purposes, to wit, whiskey, wine, champagne, gin and beer, containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes, without giving a bond as required by the said National Prohibition Act and said Regulations 60;

(h) Wilfully, unlawfully and knowingly possessing for sale, transporting and selling intoxicating liquor, to wit, whiskey, wine, champagne, gin and beer, containing one-half of one per centum and more of alcohol by volume and fit for use for bev-

erage purposes, at 1249 Polk Street, in the city and county of San Francisco, California, without making a permanent or any record thereof, in violation of Section 10 of Title II of the said National Prohibition Act;

(i) Wilfully, unlawfully and knowingly possessing for sale, transporting and selling intoxicating liquor, to wit, whiskey, wine, champagne, gin and beer, containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes, at 2031 Steiner Street, in the city and county of San Francisco, California, without making a permanent or any record thereof, in violation of Section 10 of Title II of the said National Prohibition Act; [23]

(j) Wilfully unlawfully and knowingly possessing for sale, transporting and selling intoxicating liquor, to wit, whiskey, wine, champagne, gin and beer, containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes, at 3047 California Street, in the city and county of San Francisco, California, without making a permanent or any record thereof, in violation of Section 10 of Title II of the said National Prohibition Act;

(k) Wilfully, unlawfully and knowingly possessing for sale, transporting and selling intoxicating liquor, to wit, whiskey, wine, champagne, gin and beer, containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes, at 2922 Sacramento Street, in the city and county of San Francisco, California, without making a permanent or any record thereof, in

violation of Section 10 of Title II of the said National Prohibition Act;

(l) Wilfully, unlawfully and knowingly selling and delivering intoxicating loquor, to wit whiskey, wine, champagne, gin and beer, containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes, at 1249 Polk Street, in the city and county of San Francisco, California, at wholesale without a permit to persons having no permit to purchase or receive said or any intoxicating liquor, in violation of said Section 11 of Title II, of said National Prohibition Act;

(m.) Wilfully, unlawfully and knowingly selling and delivering intoxicating liquor, to wit, whiskey, wine, champagne, gin and beer, containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes at 2031 Steiner Street, in the city and county of San Francisco, California, at wholesale without a permit to persons having no permit to purchase or receive said or any intoxicating liquor, in violation of said Section 11 of Title II of said National Prohibition Act; [24]

(n) Wilfully, unlawfully and knowingly selling and delivering intoxicating liquor, to wit, whiskey, wine, champagne, gin and beer, containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes at 3047 California Street, in the city and county of San Francisco, California, at wholesale without a permit to persons having no permit to purchase or receive said or any intoxicating liquor, in violation of said

Section 11 of Title II of said National Prohibition Act;

(o) Wilfully, unlawfully and knowingly selling and delivering intoxicating liquor, to wit, whiskey, wine, champagne, gin and beer, containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes at 2922 Sacramento Street, in the city and county of San Francisco, California, at wholesale without a permit to persons having no permit to purchase or receive said or any intoxicating liquor, in violation of said Section 11 of Title II of said National Prohibition Act;

(p) Wilfully, unlawfully and knowingly selling at wholesale in packages intoxicating liquor, to wit, whiskey, wine, champagne, gin and beer, containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes, without attaching to the packages when sold, a label setting forth the kind and quantity of liquor contained therein, by whom manufactured, the date of sale and person to whom sold, in violation of Section 12 of Title II of said National Prohibition Act;

(q) Wilfully, unlawfully and knowingly giving to carriers orders requiring the delivery of packages of intoxicating liquor, to wit, whiskey, wine, champagne, gin and beer, containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes and consigning said liquor to persons not the actual *bona fide* consignees, for the purpose of and the [25] order being to obtain said liquor by persons not the actual *bona*

fide consignees in violation of Section 16 of Title II of said National Prohibition Act;

(r) Wilfully, unlawfully and knowingly having and possessing intoxicating liquor, to wit, whiskey, wine, champagne, gin and beer, containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes, for use in violation of Title II of said National Prohibition Act, to wit, for sale for beverage purposes without having a permit to sell said liquor for beverage purposes and for sale to persons who were required to have a permit to purchase, but who had not and would not have any permit whatever to purchase said or any intoxicating liquor, in violation of said Section 21 of Title II of the National Prohibition Act;

(s) Wilfully, unlawfully and knowingly transporting and delivering intoxicating liquor, to wit, whiskey, wine, champagne, gin and beer, containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes under permits to transport to a destination and at a place other than indicated on said permits covering the shipment, in violation of said National Prohibition Act and in violation of Paragraph 10 of said "Modifications of Regulations 60" and in violation of Section 83 of Article XVI of said Regulations 60;

(t) Wilfully, unlawfully, and knowingly selling, furnishing and delivering intoxicating liquor, to wit, whiskey, wine, champagne, gin and beer, containing one-half of one per centum and more of alcohol by volume and fit for use for beverage pur-

poses in quantities of five gallons and more to persons who would be, were and are, required under the said National Prohibition Act and said Regulations 60, to have permits to purchase, Form 1410, without [26] such persons being entitled to procure intoxicating liquor or having a or any permit to purchase any intoxicating liquor;

(u) Wilfully, unlawfully and knowingly dealing in intoxicating liquor, to wit, whiskey, wine, champagne, gin and beer, containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes, without keeping Record 52 or Supplemental Record 52, or a permanent file as required by said Subdivision (e) of Section 58 of said Article IX of said Regulation 60;

(v) Wilfully, unlawfully and knowingly selling intoxicating liquor, to wit, whiskey, wine, champagne, gin and beer, containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes, at 1249 Polk Street, in the city and county of San Francisco, California, in wholesale quantities without affixing to the containers of said liquor labels showing either the name of the manufacturer, kind, quantity in wine gallons and proof contents, name of seller, date of sale or name of purchaser, in violation of Section 12 of Title II of said National Prohibition Act and in violation of Subdivision (f) of Article IX of said Regulations 60;

(w) Wilfully, unlawfully and knowingly selling intoxicating liquor, to wit, whiskey, wine, champagne, gin and beer, containing one-half of one per

centum and more of alcohol by volume and fit for use for beverage purposes, at 2031 Steiner Street, in the city and county of San Francisco, California, in wholesale quantities without affixing to the containers of said liquor labels showing either the name of the manufacturer, kind, quantity in wine gallons and proof contents, name of seller, date of sale or name of purchaser, in violation of Section 12 of Title II of said National Prohibition Act and in violation of Subdivision (f) of Article IX of said Regulations 60; [27]

(x) Wilfully, unlawfully and knowingly selling intoxicating liquor, to wit, whiskey, wine, champagne, gin and beer, containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes, at 3047 California Street, in the city and county of San Francisco, California, in wholesale quantities without affixing to the containers of said liquor labels showing either the name of the manufacturer, kind, quantity in wine gallons and proof contents, name of seller, date of sale or name of purchaser, in violation of Section 12 of Title II of said National Prohibition Act and in violation of Subdivision (f) of Article IX of said Regulations;

(y) Wilfully, unlawfully and knowingly selling intoxicating liquor, to wit, whiskey, wine, champagne, gin and beer, containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes, at 2922 Sacramento Street, in the city and county of San Francisco, California, in wholesale quantities without affixing

to the containers of said liquor labels showing either the name of the manufacturer, kind, quantity in wine gallons and proof contents, name of seller, date of sale or name of purchaser, in violation of Section 12 of Title II of said National Prohibition Act and in violation of Subdivision (f) of Article IX of said regulations;

(z) Wilfully, unlawfully and knowingly possessing certain intoxicating liquor for sale for beverage purposes, to wit, whiskey, wine, champagne, gin and beer, containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes, at 1249 Polk Street, in the city and county of San Francisco, California, without a permit therefor;

(aa) Wilfully, unlawfully and knowingly possessing certain intoxicating liquor for sale for beverage purposes, to wit, whiskey, wine, champagne, gin and beer containing one-half [28] of one per centum and more of alcohol by volume and fit for use for beverage purposes, at 2031 Steiner Street, in the city and county of San Francisco, California, without a permit therefor;

(bb) Wilfully, unlawfully and knowingly possessing certain intoxicating liquor for sale for beverage purposes, to wit, whiskey, wine, champagne, gin and beer containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes, at 3047 California Street, in the city and county of San Francisco, California, without a permit therefor;

(cc) Wilfully, unlawfully and knowingly possessing certain intoxicating liquor for sale for beverage purposes, to wit, whiskey, wine, champagne, gin and beer containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes, at 2922 Sacramento Street, in the city and county of San Francisco, California, without a permit therefor;

(dd) Wilfully, unlawfully and knowingly transporting to, possessing, using and selling intoxicating liquor, to wit, whiskey, wine, champagne, gin and beer, containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes, at places other than designated in permits in violation of Section 33 of Title II of said National Prohibition Act and in Violation of Section 80 and 80 (a) of Article XV of said Regulations 60;

(ee) Wilfully, unlawfully and knowingly securing permits to purchase and transport intoxicating liquor, to wit, whiskey, wine, champagne, gin and beer, containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes, and thereunder to purchase said whiskey, wine, champagne, gin and beer, transport and divert the same to a place other than authorized and directed by said permits; in violation of Secs. 80 and 80 (a), Article XV of Regulations 60; [29]

(ff) Wilfully, unlawfully and knowingly transporting and causing to be transported intoxicating liquor, to wit, whiskey, wine, champagne, gin and beer, containing one-half of one per centum and more

of alcohol by volume and fit for use for beverage purposes from 2031 Steiner Street, in the city and county of San Francisco, State of California, to 1249 Polk Street in the city and county of San Francisco, State of California, without a permit therefor;

(gg) Wilfully, unlawfully and knowingly transporting and causing to be transported intoxicating liquor, to wit, whiskey, wine, champagne, gin and beer, containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes from 3047 California Street, in the city and county of San Francisco, State of California, to 1249 Polk Street, in the city and county of San Francisco, State of California, without a permit therefor;

(hh) Wilfully, unlawfully and knowingly transporting and causing to be transported intoxicating liquor, to wit, whiskey, wine, champagne, gin and beer, containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes from 2922 Sacramento Street, in the city and county of San Francisco, State of California, to 1249 Polk Street, in the city and county of San Francisco, State of California, without a permit therefor;

And the Grand Jurors aforesaid, on their oaths aforesaid, do further allege, charge, find and present:

That the said conspiracy, combination, confederation and agreement between the said defendants and said divers other persons whose names are to

these Grand Jurors and to this Grand Jury unknown, was continuously throughout all the time from and after on or about the 1st day of May, 1923, and at all the times thereafter and herein mentioned, and particularly at the time and times of the commission and consummation of each and all of [30] the overt acts in this indictment set forth and up to and including the time of the filing of this indictment in existence and in course of execution.

AGAINST the peace and dignity of the United States of America and contrary to the form of the statute of the said United States of America in such case made and provided.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further allege, charge, find and present:

1.

That in pursuance of the said conspiracy, combination, confederation and agreement herein in this indictment set out and to effect and accomplish the objects thereof, and with the intent and for the purpose of effecting and accomplishing the objects thereof, the said defendant, George Hawkins, on or about the 3d day of July, 1923, at 1249 Polk Street, in the city and county of San Francisco, State of California, then and there being, did then and there sell intoxicating liquor, to wit, two (2) drinks of whiskey, containing more than one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes, to one S. J. Keveney, without a permit so to do.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further allege, charge, find and present:

2.

That in pursuance of the said conspiracy, combination, confederation and agreement herein in this indictment [31] set out and to effect and accomplish the objects thereof, and with the intent and for the purpose of effecting and accomplishing the objects thereof, the said defendant, Walter Brand, on or about the —— day of September, 1923, at 1249 Polk Street, in the city and county of San Francisco, State of California, then and there being, did then and there sell intoxicating liquor, to wit, two (2) drinks of whiskey, containing more than one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes, to one W. E. Bivens, without a permit so to do.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further allege, charge, find and present:

3.

That in pursuance of the said conspiracy, combination, confederation and agreement herein in

this indictment set out and to effect and accomplish the objects thereof and with the intent and for the purpose of effecting and accomplishing the objects thereof, the said defendant, George Birdsall, *alias* George Howard, on or about the —— day of November, 1923, at 1249 Polk Street, in the city and county of San Francisco, State of California, then and there being, did then and there sell intoxicating liquor, to wit, two (2) drinks of whiskey, containing more than one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes, to one Rudolph Herring, without a permit so to do.

AGAINST the peace and dignity of the United [32] States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further allege, charge, find and present:

4.

That in pursuance of the said conspiracy, combination, confederation and agreement herein in this indictment set out and to effect and accomplish the objects thereof and with the intent and for the purpose of effecting and accomplishing the objects thereof, the said defendant, Joseph E. Marron, *alias* Eddie Marron, on or about the 15th day of May, 1924, at 1249 Polk Street, in the city and county of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this court, did then and there

wilfully and unlawfully maintain a common nuisance and that the said defendant did then and there wilfully and unlawfully keep for sale at the premises aforesaid certain intoxicating liquor, to wit, whiskey, wine, champagne, gin and beer, the exact amount being to these Grand Jurors and to this Grand Jury unknown, and then and there containing one-half of one per centum and more of alcohol by volume, which was then and there fit for use for beverage purposes.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further allege, charge, find and present:

5.

That in pursuance of the said conspiracy, combination, confederation and agreement herein in this indictment set out and to effect and accomplish the objects thereof and with the intent and for the purpose of effecting and accomplishing the objects thereof, the said defendant, George Birdsall, *alias* George Howard, on or about the 15th day of May, 1924, at 1249 Polk [33] Street, in the city and county of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this court, did then and there wilfully and unlawfully maintain a common nuisance and that the said defendant did then and there wilfully and unlawfully keep for sale on

the premises aforesaid certain intoxicating liquor, to wit, whiskey, wine, champagne, gin and beer, the exact amount being to these Grand Jurors and to this Grand Jury unknown, and then and there containing one-half of one per centum and more of alcohol by volume, which was then and there fit for use for beverage purposes.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further allege, charge, find and present:

6.

That in pursuance of the said conspiracy, combination, confederation and agreement herein in this indictment set out and to effect and accomplish the objects thereof and with the intent and for the purpose of effecting and accomplishing the objects thereof, the said defendant, Charles Mahoney, on or about the 2d day of October, 1924, at 1249 Polk Street, in the city and county of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this court, did then and there wilfully and unlawfully maintain a common nuisance and that the said defendant did then and there wilfully and unlawfully keep for sale on the premises aforesaid certain intoxicataing liquor, to wit, whiskey, wine, champagne, gin and beer, the exact amount being to these Grand Jurors and to this Grand Jury un-

known, and then and there containing one-half of one per centum and more of alcohol by volume, which was then and [34] there fit for use for beverage purposes.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further allege, charge, find and present:

7.

That in pursuance of the said conspiracy, combination, confederation and agreement herein in this indictment set out and to effect and accomplish the objects thereof and with the intent and for the purpose of effecting and accomplishing the objects thereof, the said defendant, Patrick Kissane, then and there being a duly and regularly qualified, appointed and acting police officer of the police force in the city and county of San Francisco, California, did, on or about the 17th day of November, 1923, at 1249 Polk Street, in the city and county of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this court, receive as such police officer from said defendant George Birdsall, *alias* George Howard, the sum of Five (5.00) Dollars, lawful money of the United States of America.

AGAINST the peace and dignity of the United States of America, and contrary to the form of

the statute of the said United States of America in such case made and provided.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further allege, charge, find and present:

8.

That in pursuance of the said conspiracy, combination, confederation and agreement herein in this indictment set out [35] and to effect and accomplish the objects thereof and with the intent and for the purpose of effecting and accomplishing the objects thereof, the said defendant, Joseph Gorham, then and there being a duly and regularly qualified, appointed and acting police officer of the police force in the city and county of San Francisco, California, did, on or about the 31st day of March, 1924, at 1249 Polk Street, in the city and county of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this court, receive, as such police officer, from said defendant, George Birdsall, *alias* George Howard, the sum of Ninety (90.00) Dollars, lawful money of the United States of America.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further allege, charge, find and present:

9.

That in pursuance of the said conspiracy, combination, confederation and agreement herein in this indictment set out and to effect and accomplish the objects thereof and with the intent and for the purpose of effecting and accomplishing the objects thereof, the said defendant, Joseph E. Marron, *alias* Eddie Marron, did, on or about the 24th day of April, 1923, at 2031 Steiner Street, in the city and county of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this court, then and there wilfully and unlawfully possess certain intoxicating liquor, to wit, whiskey, wine, champagne, gin and beer, the exact amount being to these Grand Jurors and to this Grand Jury unknown, and then and there containing one-half of one per centum and more of alcohol by volume, which was then and there fit for use for beverage purposes. [36]

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further allege, charge, find and present:

10.

That in pursuance of the said conspiracy, combination, confederation and agreement herein in this indictment set out and to effect and accomplish the objects thereof and with the intent and for the purpose of effecting and accomplishing the objects

thereof, the said defendant, Joseph E. Marron, *alias* Eddie Marron, did, on or about the 26th day of August, 1924, at 3047 California Street, in the city and county of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this court, then and there wilfully and unlawfully possess certain intoxicating liquors, to wit, whiskey, wine, champagne, gin and beer, the exact amount being to these Grand Jurors and to this Grand Jury unknown, and then and there containing one-half of one per centum and more of alcohol by volume, which was then and there fit for use for beverage purposes.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further allege, charge, find and present:

11.

That in pursuance of the said conspiracy, combination, confederation and agreement herein in this indictment set out and to effect and accomplish the objects thereof and with the intent and for the purpose of effecting and accomplishing the objects thereof, the said defendant, Joseph E. Marron, *alias* [37] Eddie Marron, did, on or about the 3d day of September, 1924, at 2922 Sacramento Street, in the city and county of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this court,

then and there wilfully and unlawfully possess certain intoxicating liquors, to wit, whiskey, wine champagne, gin and beer, the exact amount being to these Grand Jurors and to this Grand Jury unknown, and then and there containing one-half of one per centum and more of alcohol by volume, which was then and there fit for use for beverage purposes.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

Dated: October 17, 1924.

STERLING CARR,
United States Attorney.

A true bill.

PERRY EYRE,
Foreman.

[Endorsed]: Presented in Open Court and Ordered Filed Oct. 17, 1924. Walter B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [38]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE HAWKINS, WALTER BRAND, JOSEPH E. MARRON, *alias* EDDIE MARRON, GEORGE BIRDSALL, *alias* GEORGE HOWARD, CHARLES MAHONEY, PATRICK KISSANE, JOSEPH GORHAM,

Defendants.

MOTION TO QUASH INDICTMENT OF JOSEPH E. MARRON, GEORGE BIRDSALL AND CHARLES MAHONEY.

Now comes the defendants Joseph E. Marron, George Birdsall and Charles Mahoney, by their counsel, and move the Court to quash the indictment herein for the following reasons:

I.

That while the Grand Jury that returned the indictment in the above-entitled cause was deliberating on the testimony taken before it in the said cause, there were present in the Grand Jury room persons not members of said Grand Jury. Said persons were not witnesses and were not undergoing examination before said Grand Jury and were not persons authorized to be present in said Grand

Jury room and that the presence of said persons in said Grand Jury room was prejudicial to the rights of defendants herein.

II.

That while the said Grand Jury was expressing opinions upon the charges of the indictment in the above-entitled cause and during their voting thereon [39] there were present in the Grand Jury room Sterling Carr, the United States Attorney for the Northern District of California, and one of the Assistant United States Attorneys for the Northern District of California. That the presence of said United States Attorney and the said Assistant United States Attorney was prejudicial to the rights of the defendants herein.

WHEREFORE, your petitioners pray that the indictment heretofore rendered be quashed.

HUGH L. SMITH,
Attorney for Said Defendants.

[Endorsed]: Filed Nov. 22, 19924. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [40]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE HAWKINS, WALTER BRAND, JOSEPH E. MARRON, *alias* EDDIE MARRON, GEORGE BIRDSALL, *alias* GEORGE HOWARD, CHARLES MAHONEY, PATRICK KISSANE, JOSEPH GORHAM,

Defendants.

PETITION TO SUPPRESS EVIDENCE (GEORGE BIRDSALL and CHARLES MAHONEY).

To the Honorable District Court of the United States in and for the Northern District of California.

The petition of George Birdsall and Charles Mahoney respectfully shows:

I.

That Samuel Rutter now is, and was at all the times herein mentioned, the duly qualified and acting prohibition director of the State of California.

II.

That on or about the 2d day of October, 1924, certain federal agents visited the premises known as No. 1249 Polk Street, San Francisco, California;

said premises being an upper flat of a two-story brick building; that at the time of said visit said federal agents were acting upon what purported to be a search-warrant lawfully issued, authorizing the search of said premises for securing evidence of a violation of the National Prohibition Act.

III.

That the ground for the issuance of said search-warrant and the ground upon which the Commissioner determined that there was probable cause for the issuance of [41] said warrant was that in said affidavit attached to said warrant it was alleged that on the 22d day of September, 1924, certain sales of intoxicating liquors had been made upon said premises in violation of the National Prohibition Act; that on said 2d day of October, 1924, the said federal agents thoroughly searched said premises known as No. 1249 Polk Street, San Francisco, California, and seized certain intoxicating liquor therein.

IV.

That on the next day, the 3d day of October, 1924, said federal agents again searched the premises known as No. 1249 Polk Street, San Francisco, California, and at the time of said search said federal agents were acting on what purported to be a search-warrant, lawfully issued, authorizing the search of said premises for the purpose of securing evidence for violation of the National Prohibition Act.

V.

That the purported warrant upon which said

agents were acting on October 3d, 1924, was issued by the United States Commissioner without probable cause for the following reason, to wit:

Said premises having been searched on October 2, 1924, said search being thorough and complete, and no evidence of further violation of the National Prohibition Act subsequent to said search of October 2, 1924, having been offered to said commissioner said commissioner could not determine that grounds existed that would justify the issuance of said warrant.

That at the time of said search of October 3, 1924, certain personal property was seized and carried away by said agents. [42]

VI.

That the search-warrant issued on October 1, 1924, was executed by W. F. Whittier on October 2, 1924, and the search-warrant issued on October 2, 1924, was executed by the said W. F. Whittier on October 3, 1924; that said W. F. Whittier is one and the same person and knew of his own knowledge that the search-warrant of October 1, 1924, had been fully executed and that said premises had been thoroughly and completely searched.

VII.

That the alleged sales enumerated in the affidavit upon which the search-warrant dated October 2, 1924, was issued were prior to the date of the issuance of the search-warrant dated October 1, 1924.

Petitioners submit that if said violations took place as alleged, that by reason of the complete and thorough search of said premises made on October

2, 1924, by virtue of a warrant dated October 1, 1924, that the said agents were precluded from making a search under and by virtue of said search-warrant dated October 2, 1924, and that the search of October 2, 1924, precluded the Government agents from making a search of said premises on October 3, 1924.

WHEREFORE, your petitioners pray that under the decisions heretofore rendered by the above-entitled court all evidence seized under and by virtue of said warrant dated October 2, 1924, should be ordered suppressed.

GEORGE BIRDSALL,
CHAS. MAHONEY,
Petitioners.
HUGH L. SMITH,
Attorney for Petitioners. [43]

State of California,
City and County of San Francisco,—ss.

George Birdsall, being first duly sworn, deposes and says: That he is one of the petitioners named in the foregoing petition; that he has read said petition and knows the contents thereof, that the same is true of his own knowledge except as to matters therein stated on information or belief and as to those matters, he believes it to be true.

GEORGE BIRDSALL.

Subscribed and sworn to before me this 22d day of November, 1924.

[Seal] C. W. CALBREATH,
Deputy Clerk, U. S. District Court, Northern District of California.

[Endorsed]: Filed Nov. 22, 1924. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [44]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE HAWKINS, WALTER BRAND, JOSEPH E. MARRON, *alias* EDDIE MARRON, GEORGE BIRDSALL, *alias* GEORGE HOWARD, CHARLES MAHONEY, PATRICK KISSANE, JOSEPH GORHAM,

Defendants.

PETITION FOR RETURN OF PROPERTY AND TO SUPPRESS EVIDENCE (GEORGE BIRDSALL AND CHARLES MAHONEY).

To the Honorable District Court of the United States in and for the Northern District of California.

The petition of George Birdsall and Charles Mahoney respectfully shows:

I.

That Samuel Rutter now is and was at all the times herein mentioned the duly qualified and acting prohibition director of the State of California.

II.

That your petitioner, George Birdsall, is now and at all the times herein mentioned was the owner and occupant of the premises known as 1249 Polk Street, San Francisco, California.

III.

That on the 2d day of October, 1924, Samuel Rutter, as the duly qualified and acting prohibition director for the State of California, through his Agent W. F. Whittier, and other prohibition agents, whose names are unknown to your petitioner, entered the premises known [45] as No. 1249 Polk Street, San Francisco, California, and carried away therefrom certain personal property, including among other things, certain papers, records and books of account which said papers, records and books of account are the private and personal property of your petitioner, George Birdsall. That at the time of said seizure of said personal property said prohibition agents were acting upon what purported to be a search-warrant lawfully issued authorizing the search of said premises for certain specified and described property which did not include the papers, records and account books heretofore described.

IV.

That the said purported search-warrant only authorized the said prohibition agents to search the said premises for the following described property, to wit:

Intoxicating liquor, to wit, alcohol, brandy, wine, whiskey, rum, gin, beer, ale, porter,

sherry wine, port wine, jackass brandy, corn whiskey, wine or pepsin, neuropin, pepsin rennin, fermented grape juice and spirituous, vinous, malt and fermented liquors, liquids and compounds by whatever name called containing one-half of one per centum or more of alcohol and fit for use for beverage purposes, stills, worms, coils, mashes, goosenecks, hydrometers, essences, caramel, coloring materials, boilers.

That the said seizure by the said prohibition agents of that portion of the personal property seized on said 2d day of October, 1924, to wit, said papers, records, and books of account, was unlawful, unreasonable and unwarranted and when said prohibition agents seized said property they became trespassers *ab initio* on said premises of your petitioner, George Birdsall, and therefore the seizure of the personal property authorized to be seized under and by virtue of said purported search-warrant became unlawful. [46]

V.

Petitioner is informed and believes, and therefore alleges that the United States Government proposes to use said personal property as evidence against your petitioners in a cospiracy action now pending.

WHEREFORE, petitioners pray that an order be made directing the return of said property seized on the 2d day of October, 1924, that all matters pertaining thereto and all things or matters

discovered as a result thereof be suppressed as evidence.

_____,
Petitioner.

_____,
Attorney for Petitioner.

State of California,
City and County of San Francisco,—ss.

George Birdsall, being duly sworn, deposes and says: That he is one of the petitioners named in the foregoing petition for return of property and to suppress evidence, that he has read said petition and knows the contents thereof, that the same is true of his own knowledge except as to the matters therein stated on information or belief, and as to those matters, he believes it to be true.

GEORGE BIRDSALL.

Subscribed and sworn to before me this 22d day of November, 1924.

[Seal] C. W. CALBREATH,
Deputy Clerk, U. S. District Court, Northern District of California.

[Endorsed]: Filed Nov. 22, 1924. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [47]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE HAWKINS, WALTER BRAND, JOSEPH E. MARRON, *alias* EDDIE MARRON, GEORGE BIRDSALL, *alias* GEORGE HOWARD, CHARLES MAHONEY, PATRICK KISSANE, JOSEPH GORHAM,

Defendants.

PETITION FOR RETURN OF PROPERTY AND TO SUPPRESS EVIDENCE (GEORGE BIRDSALL).

To the Honorable District Court of the United States in and for the Northern District of California.

Petition of George Birdsall respectfully shows:

I.

That Samuel Rutter now is and was at all the times herein mentioned the duly qualified and acting prohibition director of the State of California.

II.

That your petitioner, George Birdsall, is now and at all the times herein mentioned was the owner

and occupant of the premises known as 1249 Polk Street, San Francisco, California.

III.

That on the 2d day of October, 1924, Samuel Rutter, as the duly qualified and acting prohibition director for the State of California, through his agent W. F. Whittier, and other prohibition agents, whose names are unknown to your petitioner, entered the premises known [48] as No. 1249 Polk Street, San Francisco, California, and seized and carried away therefrom certain personal property, to wit, certain papers, records and books of account, which papers, records and account books are the private and personal property of petitioner. That at the time of said seizure of said personal property said prohibition agents were acting upon what purported to be a search-warrant, lawfully issued authorizing the search of said premises for certain specified and described property which did not include the papers, records and account-book heretofore described.

IV.

That the said purported search-warrant only authorized the said prohibition agents to search the said premises for the following described property, to wit:

> Intoxicating liquor, to wit, alcohol, brandy, wine, whiskey, rum, gin, beer, ale, porter, sherry wine, port wine, jackass brandy, corn whiskey, wine of pepsin, neuropin, pepsin rennin, fermented grape juice and spirituous, vinous, malt and fermented liquors, liquids

and compounds by whatever name called containing one-half of one per centum or more of alcohol and fit for use for beverage purposes, stills, worms, coils, mashes, goosenecks, hydrometers, essences, caramel, coloring materials, boilers.

That said search-warrant did not give said agents authority to seize the said personal property herein described; that said seizure was and is unlawful, unreasonable and unwarranted and is and was in direct violation of petitioner's constitutional rights under the Fourth and Fifth Amendments to the Constitution of the United States.

V.

Petitioner is informed and believes, and therefore alleges, that the United States Government proposes to [49] use said personal property as evidence against petitioner in a conspiracy action now pending.

Wherefore, petitioner prays that an order be made directing the return of said property forthwith to him, that all matters pertaining thereto and all things or matters discovered as a result of entries therein contained be excluded as evidence.

GEORGE BIRDSALL,
Petitioner.

HUGH L. SMITH,
Attorney for Petitioner.

State of California,
City and County of San Francisco,—ss.

George Birdsall, being first duly sworn, deposes and says: That he is the petitioner named in and

who makes the foregoing petition; that he has read said petition and knows the contents thereof, that the same is true of his own knowledge except as to matters therein stated on information or belief, and as to those matters, he believes it to be true.

GEORGE BIRDSALL.

Subscribed and sworn to before me this 22d day of November, 1924.

[Seal] C. W. CALBREATH,

Deputy Clerk, U. S. District Court, Northern District of California.

[Endorsed]: Filed Nov. 22, 1924. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [50]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE HAWKINS, WALTER BRAND, JOSEPH E. MARRON, *alias* EDDIE MARRON, GEORGE BIRDSALL, *alias* GEORGE HOWARD, CHARLES MAHONEY, PATRICK KISSANE, JOSEPH GORHAM,

Defendants.

PLEA IN BAR AND PETITION TO SUPPRESS EVIDENCE (GEORGE BIRDSALL).

Now comes George Birdsall, one of the defendants in the above-entitled cause, and moves the Court to suppress all evidence against said defendant as to that certain overt act designated as paragraph V of overt acts in the indictment on file in said cause for the following reason:

I.

That on the 15th day of May, 1924, at 1249 Polk Street, in the city and county of San Francisco, certain federal prohibition agents entered said premises at 1249 Polk Street, in the city and county of San Francisco, and searched said premises and found therein certain intoxicating liquor, to wit, whiskey, wine, champagne, gin and beer, and thereafter, on the ————, 1924, an information was filed in the Southern Division of the United States District Court for the Northern District of California, Division One, Action No. 15,018, charging your petitioner with the unlawful possession and sale of intoxicating liquor containing more than [51] one-half of one per cent and more of alcohol by volume, and also with unlawfully maintaining a common nuisance upon said premises; that on the 20th day of May, 1924, your petitioner, George Birdsall, *alias* George Howard, entered a general plea of guilty to the charges contained in said information. Thereupon a fine of five hundred dollars was imposed, or in default of payment of said fine

of five hundred dollars that the said George Birdsall, *alias* George Howard, be imprisoned in the county jail, city and county of San Francisco, State of California, until said fine was satisfied, said term of imprisonment not to extend beyond the period of five months. That on or about the 23d day of May, 1924, your said petitioner, George Birdsall, *alias* George Howard, fully satisfied said judgment by paying said fine of five hundred dollars.

II.

That the matters and things set forth in paragraph V of overt acts in said indictment are identical with the matters and things set forth in the information filed on ——— to which your said petitioner has heretofore pleaded guilty and paid the penalty imposed, thereby fully satisfying judgment as rendered. That by reason thereof, petitioner respectfully submits that he has been once in jeopardy as to the matters and things set forth in said paragraph V of overt acts in said indictment.

WHEREFORE, petitioner prays that an order be made directing the exclusion as evidence of all testimony pertaining to the matters and things specified in paragraph V of overt acts in said indictment and for such other orders as may be meet and just in the premises.

GEORGE BIRDSALL,
Petitioner.
SMITH & JACOBSON,
HUGH L. SMITH,
Attorneys for Petitioner. [52]

State of California,
City and County of San Francisco,—ss.

George Birdsall, being first duly sworn, deposes and says: That he is the petitioner named in the foregoing plea in bar and petition to suppress evidence; that he has read said plea in bar and petition to suppress evidence and knows the contents thereof, that the same is true of his own knowledge except as to the matters therein stated on information or belief, and as to those matters, he believes it to be true.

GEORGE BIRDSALL.

Subscribed and sworn to before me this 22d day of November, 1924.

[Seal] C. W. CALBREATH,
Deputy Clerk, U. S. District Court, Northern District of California.

[Endorsed]: Filed Nov. 22, 1924. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [53]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE HAWKINS, WALTER BRAND, JOSEPH E. MARRON, *alias* EDDIE MARRON, GEORGE BIRDSALL, *alias* GEORGE HOWARD, CHARLES MAHONEY, PATRICK KISSANE, JOSEPH GORHAM,

Defendants.

PLEA IN BAR AND PETITION TO SUPPRESS EVIDENCE (JOSEPH E. MARRON).

Now comes Joseph E. Marron, one of the defendants in the above-entitled cause, and moves the Court to suppress all evidence against said defendant as to that certain overt act designated as paragraph IX of overt acts in the indictment on file in said cause for the following reason:

I.

That on the 24th day of April, 1923, at 2031 Steiner Street in the city and county of San Francisco, certain federal prohibition agents entered said premises at 2031 Steiner Street, in the city and county of San Francisco, and searched said premises and found therein certain intoxicating liquors,

to wit, whiskey, wine, champagne, gin and beer, and thereafter, on the 26th day of April, 1923, an information was filed in the Southern Division of the United States District Court for the Northern District of California, Division One, Action No. 13,362, charging your petitioner with the unlawful possession and sale of intoxicating liquor containing more than one-half [54] of one per cent and more of alcohol by volume, and also with unlawfully maintaining a common nuisance upon said premises; that on the 4th day of April, 1924, your petitioner, Joseph E. Marron, entered a general plea of guilty to the charges contained in said information. Thereupon a fine of four hundred dollars was imposed, or in default of payment of said fine of four hundred dollars that the said Joseph E. Marron be imprisoned in the county jail, city and county of San Francisco, State of California, until said fine was satisfied, said term of imprisonment not to extend beyond the period of four months. That on or about the 4th day of April, 1924, your said petitioner, Joseph E. Marron, fully satisfied said judgment by paying said fine of four hundred dollars.

II.

That the matters and things set forth in paragraph IX of overt acts in said indictment are identical with the matters and things set forth in the information filed on April 26, 1923, to which your said petitioner has heretofore pleaded guilty and paid the penalty imposed, thereby fully satisfying judgment as rendered. That by reason thereof,

petitioner respectfully submits that he has been once in jeopardy as to the matters and things set forth in said paragraph IX of overt acts in said indictment.

WHEREFORE, petitioner prays that an order be made directing the exclusion as evidence of all testimony pertaining to the matters and things specified in paragraph IX of overt acts in said indictment and for such other orders as may be meet and just in the premises.

JOSEPH E. MARRON,
Petitioner.

HUGH L. SMITH,
Attorney for Petitioner. [55]

State of California,
City and County of San Francisco,—ss.

Joseph E. Marron, being first duly sworn, deposes and says: That he is the petitioner named in the foregoing plea in bar and petition to suppress evidence; that he has read said plea in bar and petition to suppress evidence and knows the contents thereof, that the same is true of his own knowledge except as to the matters therein stated on information or belief, and as to those matters, he believes it to be true.

JOSEPH E. MARRON.

Subscribed and sworn to before me this 24th day of November, 1924.

[Seal] JOHN WISNOM,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Nov. 29, 1924. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [56]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. ——.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE HAWKINS, WALTER BRAND, JOSEPH E. MARRON, *alias* EDDIE MARRON, GEORGE BIRDSALL, *alias* GEORGE HOWARD, CHARLES MAHONEY, PATRICK KISSANE, JOSEPH GORHAM,

Defendants.

PETITION TO SUPPRESS EVIDENCE (JOSEPH E. MARRON).

To the Honorable District Court of the United States, in and for the Northern District of California.

The petition of Joseph E. Marron respectfully shows:

I.

That Samuel Rutter now is and was at all the times herein mentioned the duly qualified and acting prohibition director of the State of California.

II.

That your petitioner, Joseph E. Marron, is now and at all the times herein mentioned was the lessee of a portion of those certain premises known and designated as 3047 California Street, in the city and county of San Francisco, State of California, which said premises was at all times herein mentioned and is now a private dwelling, and was occupied as such.

III.

That on or about the 26th day of August, 1924, certain police officers attached to the police department of the city and county of San Francisco, appeared at the premises known and designated as 3047 California Street, described in the preceding paragraph, and informed the occupant thereof that they desired to [57] make an inspection of said premises for the purpose of ascertaining the sanitary conditions therein. Upon said representation the occupant thereof, while not actually offering any physical resistance, unwillingly permitted said officers to enter for said purpose. That said entry by said officers under the pretext of making a sanitary inspection was merely a ruse; that no sanitary inspection was made; that thereafter said officers left said premises and later returned with certain federal prohibition officers acting under Samuel Rutter, the duly qualified and acting prohibition director of the State of California; that said agents forcibly, and without the consent of petitioner, and against his will, and without his knowledge, entered said premises and seized and

carried away therefrom certain personal property; that said entry was obtained by the breaking of the locks in the garage doors of said premises by said agents; that at the time of the forcible entry, as aforesaid, said agents, nor any of them, did not have a search-warrant to search said premises, or any portion thereof, nor did they exhibit any papers or writing purporting to be a search-warrant authorizing them to search said premises.

IV.

That at all the times herein mentioned and immediately preceding the entry, as aforesaid, no offense against the laws of the United States of America or the State of California had been committed in the presence of said agents or of said police officers. Petitioner respectfully submits that said search was in violation of the constitutional rights of petitioner under the Fourth and Fifth Amendments to the Constitution of the United States of America in that the said agents did not have a search-warrant authorizing them to search said premises or to seize said personal property.

V.

That said seizure, made as aforesaid, was unlawful, unwarranted, unreasonable, and in violation of the constitutional rights of petitioner. [58]

VI.

Petitioner is informed and believes and therefore alleges that the United States Government proposes to use said personal property heretofore seized as evidence against your petitioner in an action now pending in the above-entitled court, Divi-

sion One thereof, No. 15,708, and will do so unless the same is ordered suppressed by Court order.

WHEREFORE, petitioner prays that an order be entered excluding as evidence all property seized, as hereinbefore set out, and all matters and things pertaining thereto, which the United States Government proposes to use against your petitioner.

JOSEPH E. MARRON.

State of California,
City and County of San Francisco,—ss.

Joseph E. Marron, being first duly sworn, deposes and says: That he is the petitioner named in and who makes the foregoing petition; that he has read said petition and knows the contents thereof; that the same is true of his own knowledge except as to matters therein stated on information or belief, and as to those matters, he believes it to be true.

JOSEPH E. MARRON.

Subscribed and sworn to before me this 24th day of November, 1924.

[Seal] JOHN WISNAM,
Notary Public, in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Nov. 29, 1924. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [59]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. ——.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE HAWKINS, WALTER BRAND, JOSEPH E. MARRON, *alias* EDDIE MARRON, GEORGE BIRDSALL, *alias* GEORGE HOWARD, CHARLES MAHONEY, PATRICK KISSANE, JOSEPH GORHAM,

Defendants.

PETITION TO SUPPRESS EVIDENCE (JOSEPH E. MARRON).

To the Honorable District Court of the United States, in and for the Northern District of California.

The petition of Joseph E. Marron respectfully shows:

I.

That Samuel Rutter now is and was at all the times herein mentioned the duly qualified and acting prohibition director of the State of California.

II.

That your petitioner, Joseph E. Marron, is now and at all the times herein mentioned was the

lessee of a portion of those certain premises known and designated as 2922 Sacramento Street, in the city and county of San Francisco, State of California, which said premises was at all times herein mentioned and is now a private dwelling, and was occupied as such.

III.

That on or about the 3d day of September, 1924, certain police officers attached to the police department of the city and county of San Francisco, appeared at the premises known and designated as 2922 Sacramento Street, described in the preceding paragraph, and informed the occupant thereof that they desired to [60] make an inspection of said premises for the purpose of ascertaining the sanitary conditions therein. Upon said representation the occupant thereof, while not actually offering any physical resistance, unwillingly permitted said officers to enter for said purpose. That said entry by said officers under the pretext of making a sanitary inspection was merely a ruse. That no sanitary inspection was made. That thereafter said officers left said premises and later returned with certain federal prohibition officers acting under Samuel Rutter, the duly qualified and acting prohibition director of the State of California. That said agents forcibly, and without the consent of petitioner, and against his will, and without his knowledge, entered said premises and seized and carried away therefrom certain personal property. That at the time of the forcible entry, as aforesaid, said agents, nor any of them, did not

have a search-warrant to search said premises, or any portion thereof, nor did they exhibit any papers or writing purporting to be a search-warrant authorizing them to search said premises.

IV.

That at all the times herein mentioned and immediately preceding the entry, as aforesaid, no offense against the laws of the United States of America or the State of California had been committed in the presence of said agents or of said police officers. Petitioner respectfully submits that said search was in violation of the constitutional rights of petitioner under the Fourth and Fifth Amendments to the Constitution of the United States of America in that the said agents did not have a search-warrant authorizing them to search said premises or to seize said personal property.

V.

That said seizure, made as aforesaid, was unlawful, unwarranted, unreasonable, and in violation of the constitutional rights of petitioner. [61]

VI.

Petitioner is informed and believes and therefore alleges that the United States Government proposes to use said personal property heretofore seized as evidence against your petitioner in an action now pending in the above-entitled court, Division One thereof, No. 15,708, and will do so unless the same is ordered suppressed by Court order.

WHEREFORE, petitioner prays that an order be entered excluding as evidence all property seized,

as hereinbefore set out, and all matters and things pertaining thereto, which the United States Government proposes to use against your petitioner.

JOSEPH E. MARRON.

State of California,
City and County of San Francisco,—ss.

Joseph E. Marron, being first duly sworn, deposes and says: That he is the petitioner named in and who makes the foregoing petition; that he has read said petition and knows the contents thereof; that the same is true of his own knowledge except as to matters therein stated on information or belief, and as to those matters, he believes it to be true.

JOSEPH E. MARRON.

Subscribed and sworn to before me this 24th day of November, 1924.

[Seal] JOHN WISNOM,
Notary Public, in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Nov. 29, 1924. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [62]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 15,708.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE HAWKINS et al.,

Defendants.

AFFIDAVIT OF D. W. RINCKEL.

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

D. W. Rinckel, being first duly sworn, deposes and says: That he is, and at all of the times herein mentioned was a federal prohibition agent and acting as such under the direction of Samuel Rutter, federal prohibition director of the State of California;

That affiant is informed and believes and therefore asserts as a fact that Joseph E. Marron, one of the defendants in this case, does not live at 2922 Sacramento Street, San Francisco, but that the residence part of said building is occupied and owned by one Herman Baum and that said Joseph E. Marron leased only the basement on said premises in which was stored the liquor seized on said date hereinafter mentioned.

That on the 3d day of September, 1924, in response to a telephone communication from the police officers of the police department of the city and county of San Francisco, he, together with other agents, went to 2922 Sacramento Street, San Francisco, and met said police [63] officers of said police force at said place; that at said time and at said place said police officers informed affiant and the federal agents accompanying him that there was a quantity of liquor located at said place and that they desired to turn over said intoxicating liquor to the federal officers, and thereupon said police officers did take affiant and said agents to where said liquor was, and affiant and said agents did thereupon take possession of said intoxicating liquor from said police officers.

D. W. RINCKEL.

Subscribed and sworn to before me this 6th day of December, 1924.

[Seal] A. C. AURICH,
Deputy Clerk, U. S. District Court, Northern District of California.

[Endorsed]: Filed Dec. 6, 1924. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [64]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. ——.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GEORGE HAWKINS, WALTER BRAND, JOSEPH E. MARRON, *alias* EDDIE MARRON, GEORGE BIRDSALL, *alias* GEORGE HOWARD, CHARLES MAHONEY, PATRICK KISSANE, JOSEPH GORHAM,
Defendants.

AFFIDAVIT OF W. F. WHITTIER.

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

W. F. Whittier, being first duly sworn, deposes and says: That he is, and at all of the times herein mentioned was a federal prohibition agent and acting as such under the direction of Samuel F. Rutter, federal prohibition director of the State of California;

That he was one of the prohibition agents which executed a search-warrant on 1249 Polk Street, San Francisco, California, on the 2d day of October, 1924; that the only paper, record or book

of account seized in said raid at said place at said time was a book of account and the entire contents of which referred to and was in connection with the illegal possession and sale of intoxicating liquor at said place, and which said book of account was taken from among bottles of intoxicating liquor seized from said place at said time; also certain bills and receipts pertaining to the [65] maintaining of said place as a common nuisance by the illegal possession and sale of intoxicating liquors at said place.

W. F. WHITTIER.

Subscribed and sworn to before me this 5th day of December, 1924.

[Seal] FRANCIS KRULL,
U. S. Commissioner Northern District of California at S. F.

[Endorsed]: Filed December 6, 1924. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [66]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 15,488.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GEORGE HAWKINS et al.,
Defendants.

AFFIDAVIT OF A. R. SHURTLEFF.

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

A. R. Shurtleff, being first duly sworn, deposes and says: That he is, and at all of the times herein mentioned was a federal prohibition agent and acting as such under the direction of Samuel F. Rutter, federal prohibition director of the State of California.

That affiant is informed and believes and therefore asserts as a fact that Joseph E. Marron, one of the defendants in this case, does not live at 3047 California Street, but that the residence part of said building is occupied and owned by one W. F. Curran and that said Joseph E. Marron leased only a garage on said premises in which was stored the liquor seized on said date hereinafter mentioned.

That on the 26th day of August, 1924, in response to a telephone communication from the police officers of the police department of the city and county of San Francisco, he, together with other agents, went to 3047 California Street, San Francisco, and met said police officers of said police force at said place; that at said time and at said [67] place said police officers informed affiant and the federal agents accompanying him that there was a quantity of liquor located at said place and that they desired to turn over said intoxicating liquor to the

federal officers, and thereupon said police officers did take affiant and said agents to where said liquor was, and affiant and said agents did thereupon take possession of said intoxicating liquor from said police officers.

A. R. SHURTLEFF.

Subscribed and sworn to before me this 6th day of December, 1924.

[Seal] C. W. CALBREATH,
Deputy Clerk, U. S. District Court, Northern District of California.

[Endorsed]: Filed December 6th, 1924. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [68]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 15,488.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE HAWKINS et al.,

Defendants.

AFFIDAVIT OF PERRY EYRE.

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

Perry Eyre, being first duly sworn, deposes and

says: That during all of the time from the second Monday in July, 1924, to and including the time when an indictment was returned in the above-entitled action, he was the foreman of the Federal Grand Jury for the above-entitled District; that on each and every occasion when the Grand Jury convened for the purpose of taking testimony, deliberating on or voting upon the indictment in the above-entitled case, he was present in the Grand Jury room; that during the time when testimony was being presented to said Grand Jury on said above-mentioned indictment there were only present the witness being examined, Special Assistant United States Attorney Kenneth C. Gillis, and during a part of said times United States Attorney Sterling Carr; that on none of said times was there present in said Grand Jury room while said testimony was being taken any other person except those mentioned above; that during none of the time while said Grand Jury was deliberating on said case or while said Grand [69] Jury and said Grand Jurors were considering the charges upon said indictment or expressing opinions upon the same was there any other person in said Grand Jury room except duly selected, qualified and acting members of said Grand Jury.

PERRY EYRE.

Subscribed and sworn to before me this 5th day of December, 1924.

[Seal] C. W. CALBREATH,

Deputy Clerk, U. S. District Court, Northern District of California.

[Endorsed]: Filed December 6, 1924. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [70]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the court-room thereof, in the city and county of San Francisco, on Saturday, the sixth day of December, in the year of our Lord one thousand nine hundred and twenty-four. Present: The Honorable JOHN S. PARTRIDGE, District Judge.

No. 15,708.

UNITED STATES OF AMERICA

vs.

GEO. HAWKINS et al.

MINUTES OF COURT—DECEMBER 6, 1924—ORDER DENYING MOTIONS TO EXCLUDE EVIDENCE, etc.

This case came on regularly for hearing on motion to exclude evidence, motion for return of personal property, plea in abatement and in bar. After hearing Hugh Smith, Esq., attorney for defendants, and K. C. Gillis, Esq., Asst. U. S. Atty., ordered motions to exclude, etc., denied (to which order Mr. Smith entered exception), EXCEPT as to George Birdsall and Charles Mahoney and as to their motions Court ordered same continued to Dec. 13, 1924, for hearing.

Mr. Smith made a motion to quash indictment. After hearing attorneys, ordered motion denied.

Page 310, Vol. 64. [71]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE HAWKINS, WALTER BRAND, JOSEPH E. MARRON, *alias* EDDIE MARRON, GEORGE BIRDSALL, *alias* GEORGE HOWARD, CHARLES MAHONEY, PATRICK KISSANE, JOSEPH GORHAM,

Defendants.

AMENDED PETITION TO SUPPRESS EVIDENCE (GEORGE BIRDSALL AND CHARLES MAHONEY.)

To the Honorable District Court of the United States in and for the Northern District of California,

The petition of George Birdsall and Charles Mahoney respectfully shows:

I.

That Samuel Rutter now is, and was at all the times herein mentioned, the duly qualified and acting prohibition director of the State of California.

II.

That your petitioner, George Birdsall, is now and at all the times herein mentioned was the owner and occupant of the premises known as 1249 Polk Street, San Francisco, California.

III.

That on or about the 2d day of October, 1924, certain federal agents visited the premises known as 1249 Polk Street, San Francisco, California; said premises being an upper flat of a two-story brick building; that at the time of said [72] visit said federal agents were acting upon what purported to be a search-warrant lawfully issued, authorizing the search of said premises for securing evidence of a violation of the National Prohibition Act.

IV.

That the ground for the issuance of said search-warrant and the ground upon which the Commissioner determined that there was probable cause for the issuance of said warrant was that in said affidavit attached to said warrant it was alleged that on the 22d day of September, 1924, certain sales of intoxicating liquors had been made upon said premises in violation of the National Prohibition Act; that on said 2d day of October, 1924, the said federal agents thoroughly searched said premises known as 1249 Polk Street, San Francisco, California, and seized certain intoxicating liquor therein.

V.

That on the next day, the 3d day of October, 1924, said federal agents again searched the prem-

ises known as No. 1249 Polk Street, San Francisco, California, and at the time of said search said federal agents were acting upon what purported to be a search-warrant, lawfully issued, authorizing the search of said premises for the purpose of securing evidence for violation of the National Prohibition Act.

VI.

That the purported warrant upon which said agents were acting on October 3d, 1924, was issued by a United States Commissioner without probable cause for the following reason, to wit: [73]

Said premises having been searched on October 2, 1924, said search being thorough and complete, and no evidence of further violation of the National Prohibition Act subsequent to said search of October 2, 1924, having been offered to said Commissioner, said commissioner could not determine that grounds existed that would justify the issuance of said warrant.

That at the time of said search of October 3, 1924, certain personal property was seized and carried away by said agents.

VII.

That the search-warrant issued on October 1, 1924, was executed by W. F. Whittier on October 2, 1924, and the search-warrant issued on October 2, 1924, was executed by the said W. F. Whittier on October 3, 1924; that said W. F. Whittier is one and the same person and knew of his own knowledge that the search-warrant of October 1, 1924, had been

fully executed and that said premises had been thoroughly and completely searched.

VIII.

That the alleged sales enumerated in the affidavit upon which the search-warrant dated October 2, 1924, was issued were prior to the date of the issuance of the search-warrant dated October 1, 1924.

Petitioners submit that if said violations took place as alleged, that by reason of the complete and thorough search of said premises made on October 2, 1924, by virtue of a warrant dated October 1, 1924, that the said agents were precluded from making a search under and by virtue of [74] said search-warrant dated October 2, 1924, and that the search of October 2, 1924, precluded the Government agents from making a search of said premises on October 3, 1924.

WHEREFORE, your petitioners pray that under the decisions heretofore rendered by the above-entitled court all evidence seized under and by virtue of said warrant dated October 2, 1924, should be ordered suppressed.

GEORGE L. BIRDSALL,
Petitioner. [75]

State of California,
City and County of San Francisco,—ss.

George Birdsall, being duly sworn, deposes and says: That he is one of the petitioners named in the foregoing amended petition to suppress evidence; that he has read said amended petition and knows the contents thereof, that the same is true

of his own knowledge except as to the matters therein stated on information or belief, and as to those matters, he believes it to be true.

GEORGE L. BIRDSALL.

Subscribed and sworn to before me this 27 day of December, 1924.

[Seal] C. M. TAYLOR,

Deputy Clerk, U. S. District Court, Northern District of California.

[Endorsed]: Filed Dec. 27, 1924. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [76]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 15,708.

UNITED STATES OF AMERICA

vs.

WALTER BRAND et al.

(VERDICT.)

We, the Jury, find as to the defendants at the bar as follows:

Walter Brand—Not Guilty.

Joseph E. Marron—Guilty.

George Birdsall—Guilty.

Charles Mahoney—Guilty, with a recommendation that leniency be shown and a fine only be imposed.

Patrick Kissane—Guilty.

Joseph Gorham—Guilty.

ALFRED P. FISHER,
Foreman.

[Endorsed]: Filed Jan. 14, 1925, at 4 o'clock and 50 minutes P. M. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [77]

In the Southern Division of the District Court of the United States for the Northern District of California, First Division.

No. 15,708.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOSEPH GORHAM et al.,
Defendants.

MOTION FOR NEW TRIAL OF DEFENDANT JOSEPH GORHAM.

Now comes the defendant, Joseph Gorham, and moves the Court that the verdict herein rendered be vacated and a new trial be granted said defendant for the following reasons:

1. That the verdict was contrary to the evidence.
2. That the verdict was contrary to the weight of the evidence.
3. That the verdict was contrary to the law as given to the jury by the Court.
4. That the Court erred in refusing instruction No. 1 requested by defendant, Gorham.
5. That the Court erred in admitting evidence contrary to the law.
6. That newly discovered and material evidence has come to light since the trial.
7. Errors of law occurring at the trial, and which errors of law defendant Gorham regularly and duly excepted to.
8. That new evidence material to defendant Gorham has been discovered, which he could not with due and reasonable diligence, produce at the trial. [78]

WHEREFORE, defendant Gorham respectfully prays this Honorable Court that the verdict herein rendered be set aside and that a new trial be allowed.

WILLIAM A. KELLY,
Attorney for Defendant, Joseph Gorham.

[Endorsed]: Filed Jan. 20, 1925, *nunc pro tunc* as of Jan. 14, 1925. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [79]

In the Southern Division of the District Court of the United States for the Northern District of California, First Division.

No. 15,708.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH GORHAM et al.,

Defendants.

AFFIDAVIT OF DEFENDANT JOSEPH GORHAM IN SUPPORT OF MOTION FOR A NEW TRIAL.

State of California,
City and County of San Francisco,—ss.

Joseph Gorham, being first duly sworn, deposes and says:

My name is Joseph Gorham. I am one of the defendants in the above-entitled proceeding. I am and have been for a number of years past, a sergeant of police in the police department of the city and county of San Francisco, State of California. I was off duty in said police department the first seventeen days of September, 1924. I reported back to duty in said department on the 18th day

of September, 1924. Said seventeen days comprehend my regular days off and my vacation period. My vacation period was spent at Richardson Springs, California, Marysville, California, and Sacramento, California.

I was not at any time during the month of September, 1924, in the premises referred to throughout the testimony in this case, 1249 Polk Street, San Francisco, California. I do not know the witness Latham, who testified during the last few moments of the trial of this case. I never saw him before he appeared as a witness in this [80] Court. I was not in his presence at or about 11 or 11:30 o'clock on any day in the latter part of September, 1924, at said 1249 Polk Street, or at any other time of any day in September, 1924. I was not in the kitchen of said 1249 Polk Street on any day in the latter part of September, 1924, at or about 11 or 11:30 of such day or on any day at any time of any day of September, 1924, nor was I ever in said kitchen at any time in my life. I did not witness the transaction testified to by said Latham, to wit: the pouring of liquor by said Latham into a glass, the drinking of same by said Latham and the payment by said Latham to one Mahoney, of money therefor.

I was on duty in said police department on every day in September, 1924, from the 18th day thereof, to and including the last day thereof. I was in the various police courts of the city and county of San Francisco, State of California, on all of the days of September, 1924, commencing with the 18th

day thereof, down to and including the last day thereof in connection with the prosecution of cases of defendants arrested by myself and posse, to wit: Officers Maquire and Ward, excepting on the 21st and 28th days of September, 1924, which days were Sundays. I arrived at said police courts on each of said days at about 10:30 A. M. thereof, and did not leave the same on any of said days until at least 12 M. of said days and often at a later hour.

Following are the records of arrests made by myself and said posse and the dates whereon in connection therewith I was as aforesaid in said police courts of said city and county of San Francisco:

"Sept. 18th. Jean Clark, 635 Larkin Street, Keeping a House of Ill Fame and Vagrancy.

Ester Sullivan, #635 Larkin Street, [81] Inmate of a House of Ill Fame.

Benjamin Burke, John Nelson, Fred Brown and Thomas O'Hara, visitors to a House of Ill Fame. Police Court Dept. #1—Judge O'Brien.

Jacquelini Brown (Colored), Soliciting Prostitution and Vagrancy. Geary and Webster Streets. Continued until September 25th, 1924. Police Court Dept. #1—Judge O'Brien.

Sept. 19th: Edna Petroza, #213 Elm Avenue, Keeping a House of Ill Fame. Jess Garcia, #213 Elm Avenue, Violation the Pimping Law and Section 476 Penal Code.

William Strong, #213 Elm Avenue, Violation the Pimping Law and contributing to the de-

linquency of a Minor. Police Court Dept. #1—Judge O'Brien.

20th: Margaret Norton, 1548 Market Street, Keeping a House of Ill Fame. Inmate of a House of Ill Fame and Vagrancy.

Helen Hayes, 1548 Market Street, Inmate of a House of Ill Fame and Vagrancy.

John Brown and Joseph McKay. Visitors to a House of Ill Fame. Police Court Dept. #1—Judge O'Brien.

22d: Helen Hilton, 617 Ellis Street. Keeping a House of Ill Fame—Soliciting Prostitution and Vagrancy. Police Court Dept. #1—Judge O'Brien.

May Morris, Golden Gate Avenue and Hyde Street, Soliciting Prostitution and Vagrancy. Police Court Dept. #1—Judge O'Brien.

22d: Harold Cabot, 1051 Post Street. Violating the State Prohibition Act. (Sale and Possession.) Police Court Dept. #2—Judge Lazarus.

Alfred Bishop, 1724 Fillmore Street, Keeping a Gambling Place, Claude Berton, Jack Allen, Herman Offenbach, Robert Zemon, Harold Sydelman, Harry Goldman, George Bates, Ed. Miller, William Perry, Raymond Meehan, Frank White, Joseph Brown, Arthur Hyatt, Frank Deliss, Harvey Burton, Andrew J. Whitmane and Antone Sanders, Visitors to a Gambling Place. Police Court Dept. #2—Judge Lazarus.

23d: Ethel Davis, 602 Golden Gate Avenue, Keeping a House of Ill Fame. Soliciting Prostitu-

tion and Vagrancy. Police Court Dept. #1—Judge O'Brien.

Ethel Waldon, 1708 Webster Street. Keeping a House of Ill Fame. Soliciting Prostitution and Vagrancy. Police Court Dept. #1—Judge O'Brien.

24th: Margaret Norton, 1548 Market Street, Keeping a House of Ill Fame, Soliciting Prostitution and Vagrancy. Police Court Dept. #1—Judge O'Brien.

24th: Marie Devon, 381 Turk Street. Keeping a House of Ill Fame. Soliciting Prostitution and Vagrancy. Police Court Dept. #1—Judge O'Brien. [82]

25th: Jacqueline Brown (Colored), Geary and Webster Streets, Soliciting Prostitution and Vagrancy. Continued from Sept. 18th, 1924. Police Court Dept. #1—Judge O'Brien.

25th: Ethel Waldon, 1708 Webster Street. Keeping a House of Ill Fame. Soliciting Prostitution and Vagrancy. Continued from September 23d, 1924. Police Court Dept. #1—Judge O'Brien.

26th: Frances Lee, Ellis and Webster Streets, Soliciting Prostitution and Vagrancy. Police Court Dept. #1—Judge O'Brien.

27th: Helen Williams, 802A McAllister Street. Keeping a House of Ill Fame. Soliciting Prostitution and Vagrancy. Police Court Dept. #1—Judge O'Brien.

27th: Andree Miller, 1764 Geary Street. Keeping a House of Ill Fame, Soliciting Prostitution

and Vagrancy. Rudolph Durant, Visitor to a House of Ill Fame. Police Court Dept. #1—Judge O'Brien.

29th: Eva Stewart, 525 Leavenworth Street. Soliciting Prostitution and Vagrancy. Herman King, Visiting a House of Ill Fame. Police Court, Dept. #1—Judge O'Brien.

29th: Henry Shimizu, Phillip Moore and D. Ispirito, 1623 Buchanan Street, Keepers of a Gambling Place. Tifoles Gonzales, Jimmie Inajaki, Peter Miner, Tom Yama, M. Gortez, Yama Nihi, Exlogio Ramez, Charles Wong, Frank Chan, Sam Toda, Yosiho Yoshido, Henry Maria, Frank Toda, M. Igachi, H. Haya, Pon Ciano, Romelo Castro, Frank Rapado, and I. Mori, Visitors to a Gambling Place. Bill Lomioc, Pedro Lopes, D. Shipizu, Ed. Agawain, N. Bon. Police Court Dept. #4—Judge Jacks.

29th: Thomas Gillen and Harry Levos, *alias* Henry Lewis, 1137 Fillmore Street. Violating State Poison Law. Rebooked and tried on September 30th, 1924. Police Court Dept. #4—Judge Jacks.

Last two cases on September 29th, 1924, continued to September 30th, 1294, upon which last-mentioned date they were disposed of.

On said Sundays, to wit: September 21st and September 28th, 1924, I did not report to the Bush Street police station, the station to which I was in said month of September, assigned, until about 2 P. M. of said days.

I reside at 1132 Masonic Avenue, in the city and county of San Francisco, State of California, and on said Sundays remained in my home all morning until about 12 M. of said Sundays, whereupon I attended religious services [83] and after said religious services, returned to my home, remained there for a brief period and then went to said police station, arriving there as aforesaid at about 2 P. M.

Said Latham was the last witness called in this case and called by the Government in rebuttal. I was taken by surprise at the testimony given by him in alleged rebuttal and the evidence of the cases I have hereinbefore set forth and my connection therewith, is material to me, and I could not with reasonable diligence have discovered it and produced it at the trial, because of the manner in which and the time at which Latham testified and the subject matter to which he testified. Said Latham did not fix the date in September, 1924, when he claims to have seen me at said 1249 Polk Street, any more definitely than to say that it was in the latter part of September, and for this additional reason, said evidence of my movements as hereinbefore set forth during the whole month of September, 1924, was and is material to me.

JOSEPH GORHAM.

Subscribed and sworn to before me this 19th day of January, 1925.

[Seal] R. H. JONES,

Notary Public, in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Jan. 20, 1925, *nunc pro tunc* as of Jan. 14 1925. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [84]

In the District Court of the United States, for the Northern District of California, First Division.

No. 15,708.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE HAWKINS et al.,

Defendants.

MOTION FOR NEW TRIAL FOR DEFENDANTS JOSEPH E. MARRON, *alias* EDDIE MARRON, AND GEORGE BIRDSALL, *alias* GEORGE HOWARD.

Now come the defendants Joseph E. Marron and George Birdsall and move the Court that the verdict herein rendered be vacated and a new trial heard for the following reasons:

1. That the verdict is contrary to the evidence.
2. That the verdict is contrary to the weight of the evidence.
3. That the verdict is contrary to the law as given to the jury by the Court.
4. That the Court erred in refusing defendants Joseph E. Marron and George Birdsall special in-

structions, Nos. 1, 3, 12, 16, 17, 18, 23, 24, 26, 27, 30, 31 and 36.

5. That the Court erred insomuch of its general charge as is left to the jury to determine whether or not the defendants here, or either, or any of them, were the parties to the, or any, conspiracy as charged in the indictment.

6. That the Court erred in admitting evidence contrary to law.

7. That new and material facts have come to light since the trial.

8. That other errors at law appeared upon the trial, prejudicial to defendants. [85]

9. That errors at law occurred during the trial of the case in admitting evidence prior to June, 1923, and subsequent to October 3, 1924, which were duly excepted to by the defendants.

10. Errors of law occurring at the trial and excepted to by the defendants.

11. Further, on the ground of newly discovered evidence.

HUGH L. SMITH,
Attorney for Defendant Joseph E. Marron.

HUGH L. SMITH,
CHAS. J. WISEMAN,
Attorneys for George Birdsall.

Receipt of a copy of the within motion for new trial is hereby admitted this 14th day of January, 1924.

STERLING CARR,
U. S. Attorney.
KENNETH C. GILLIS,
Asst. U. S. Attorney.

[Endorsed]: Filed Jan. 20, 1925, *nunc pro tunc* as of Jan. 14, 1925. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [86]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 15,708—Cr.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PATRICK KISSANE et al.,

Defendants.

MOTION FOR A NEW TRIAL (PATRICK KISSANE).

Now comes Patrick Kissane, one of the defendants in the above-entitled cause, and by Jos. L. Taaffe, Esq., his attorney, moves the Court to set aside the verdict rendered herein and to grant a new trial of said cause and for reasons therefor, shows to the Court the following:

I.

That the verdict in said cause is contrary to law.

II.

That the verdict in said cause was not supported by the evidence in the case.

III.

That the evidence in said cause is insufficient to justify said verdict.

IV.

That the Court erred upon the trial of said cause in deciding questions of law arising during the course of the trial, which errors were duly excepted to.

V.

That the Court improperly instructed the jury to the defendant's prejudice.

Dated at San Francisco, California, this 14th day of January, 1925.

PATRICK KISSANE,
Defendant.
JOS. L. TAAFFE,
Attorney for Defendant. [87]

Dated at San Francisco, California, this 14th day of January, 1925.

PATRICK KISSANE,
Defendant.
JOS. L. TAAFFE,
Attorney for Defendant.

[Endorsed]: Filed Jan. 20, 1925, *nunc pro tunc* as of Jan. 14, 1925. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [88]

In the District Court of the United States, for the Northern District of California, First Division.

No. 15,708.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE HAWKINS et al.,

Defendants.

MOTION IN ARREST OF JUDGMENT (JOSEPH E. MARRON AND GEORGE BIRDSALL).

Now comes the defendants Joseph E. Marron and George Birdsall in the above-entitled action and against whom a verdict of guilty was rendered on the 14th day of January, 1925, on the indictment filed herein, and move the Court to arrest the judgment against said defendants on said indictment and hold for naught the verdict of guilty rendered against them for the following reasons:

1. That said indictment does not charge any offense against the laws of the United States nor does it charge said defendants with the doing of anything, the doing of which is forbidden by the laws of the United States.

2. That said indictment does not set forth any facts sufficient in law to constitute a conviction.

3. That there is no fact or circumstance stated

therein to advise the Court that an offense has been committed against the United States.

4. That evidence against these defendants has been received and considered there on matters pertaining to former jeopardy after said jeopardy had already attached as to each of them.

5. That said indictment fails to set forth every element of the offense intended to be charged.

6. That it does not set forth any facts sufficient [89] in law to support a conviction.

7. That these defendants have been convicted without due process of law, and in violation of Articles IV, V, and VI of Amendments of the Constitution of the United States.

WHEREFORE, these defendants pray that this motion be sustained and the judgment of conviction against them be arrested and held for naught, and that they have all such other orders as may be just and proper in the premises.

HUGH L. SMITH,
Attorney for Defendant.
JOSEPH E. MARRON,
HUGH L. SMITH, and
CHAS. WISEMAN,
Attorneys for Defendant George Birdsall.

Receipt of a copy of the within motion in arrest of judgment is hereby admitted this 14th day of Jan., 1925.

STERLING CARR,
U. S. Attorney.
KENNETH C. GILLIS,
Asst. U. S. Attorney.

[Endorsed]: Filed Jan. 20, 1925, *nunc pro tunc* as of Jan. 14, 1925. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [90]

In the Southern Division of the District Court of the United States for the Northern District of California, First Division.

No. 15,708.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH GORHAM et al.,

Defendants.

MOTION TO ARREST THE JUDGMENT (JOSEPH GORHAM).

Now comes defendant, Joseph Gorham, in the above-entitled action, and against whom a verdict of "guilty" was rendered on the 14th day of January, 1925, on the indictment herein, and moves the Court to arrest the judgment against said defendant and hold for naught the verdict of "guilty" rendered against him for the following reasons:

1. That said indictment does not charge any offense against the laws of the United States, nor does it charge said defendant with the doing of anything, the doing of which is prohibited by the laws of the United States.

2. That the said indictment does not state facts

sufficient to constitute an offense against the laws of the United States.

3. That said indictment does not set forth facts sufficient in law to support the evidence.

4. That the defendants in said cause entered into a conspiracy to do the acts charged to have been done by them, is a conclusion of law and does not state any cause or offense against the laws of the United States. [91]

5. That allegation "7" in said indictment:

> "That in pursuance of said conspiracy, combination, confederation and agreement herein in this indictment set out, and to effect and accomplish the objects thereof, and with the intent and for the purpose of effecting and accomplishing the objects thereof, the said defendant Joseph Gorham, then and there being a duly and regularly qualified, appointed and acting police officer of the police force in the City and County of San Francisco, California, did on or about the 31st day of March, 1924, at 1249 Polk Street, in the City and County of San Francisco, in the Southern Division for the Northern District of California, within the jurisdiction of this court, received as such police officer from said defendant, George Birdsall, *alias* George Howard, *as such police officer from said defendant, George Birdsall, alias George Howard*, the sum of $90.00, lawful money of the United States,
>
> Against the peace and dignity of the United States of America and contrary to the form of

the statute of the United States of America in such cases provided:

(a) That there is no statute of the United States of America preventing a police officer or police sergeant of the city and county of San Francisco, from receiving money from any person.

(b) That it is no crime, nor is it forbidden by the laws of the State of California, for a police officer, or a police sergeant of the city and county of San Francisco, to receive money from any person.

(c) That said paragraph setting forth said alleged overt act does not state that said sum of $90.00 was received by said Joseph Gorham as such police officer or sergeant, for any unlawful purpose.

(d) That said paragraph does not state that said Joseph Gorham received said sum of $90.00 for the purpose of permitting the other defendants or any or either of them charged in said indictment, to violate any law or laws of the United States.

WHEREFORE, this defendant prays that this motion be [92] sustained and that judgment of conviction against him be arrested and held for naught and that he have all such further orders as may be just and proper in the premises.

WILLIAM A. KELLY,
Attorney for Defendant, Joseph Gorham.

[Endorsed]: Filed January 20, 1925, *nunc pro tunc* as of Jan. 14, 1925. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [93]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 15,708.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

PATRICK KISSANE et al.,
Defendants.

MOTION IN ARREST OF JUDGMENT (PATRICK KISSANE).

Now comes the defendant, Patrick Kissane, and respectfully moves this Court to arrest and withhold judgment in the above-entitled cause and that the verdict of conviction of said defendant, Patrick Kissane, heretofore given and made in said cause be vacated and set aside and declared to be null and void for each of the following causes and reasons:

I.

That the facts stated in the indictment on file herein and upon which said conviction was and is based and upon which judgment was pronounced do not constitute a crime or public offense within the jurisdiction of this Court.

II.

That said indictment does not state facts sufficient to charge the defendant Kissane with any

crime or offense against the United States or against any statute or law thereof.

III.

That said indictment does not state facts sufficient to charge the defendant Kissane with having conspired with the defendants named in said indictment or each or either of them to commit any crime or offense against the United [94] States or any law or statute thereof.

IV.

That the allegations in said indictment that the defendants in said cause entered into a conspiracy to do the acts therein charged to have been done by them is merely a conclusion of law and does not state any crime or offense against the United States or any law or statute thereof.

V.

That allegation 7 of said indictment, to wit:

"That in pursuance of said conspiracy, combination, confederation and agreement herein in this indictment set out and to effect and accomplish the objects thereof, and with the intent and for the purpose of effecting and accomplishing the objects thereof, the said defendant, Patrick Kissane, then and there being a duly and regularly qualified appointed and acting police officer of the police force of the city and county of San Francisco, California, did on or about the 17th day of November, 1923, at 1249 Polk Street in the city and county of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this court, receive as such police officer from said

defendant George Birdsall, *alias* George Howard the sum of Five ($5.00) Dollars lawful money of the United States of America."

"Against the peace and dignity of the United States of America and contrary to the form of the statute of the said United States of America in such case made and provided," is insufficient to charge an overt act in furtherance of said conspiracy etc.; for the following reasons: [95]

a. That there is no statute of the United States of America which forbids or prohibits a person receiving money as a police officer.

b. That it is no crime nor is it forbidden by the laws of the State of California for a person to receive money as a police officer.

c. That said paragraph 7 setting forth said alleged overt act does not state that the said sum of Five Dollars was received by said Patrick Kissane as such police officer for any unlawful purpose.

d. That said paragraph 7 does not state that said Patrick Kissane received said sum of Five Dollars for the purpose of permitting the other defendants or any or either of them charged in said indictment, to violate any law or laws of the United States.

II.

That this Honorable Court has no jurisdiction to pass judgment upon the defendant, Patrick Kissane, by reason of the fact that the said indictment fails to charge said defendant with any crime against the United States, but on the contrary the

said indictment shows affirmatively that the matters and things which the said Kissane is alleged to have done in connection with the other defendants or any or either of them are not unlawful or criminal, or in violation of any penal statute of the United States and more particularly for the reasons hereinbefore set forth in paragraph one of this motion.

WHEREFORE, by reason of the premises the said defendant Patrick Kissane prays this Honorable Court that judgment herein be arrested and withheld and that conviction of said defendant, Patrick Kissane be declared null [96] and void.

JOS. L. TAAFFE,
Attorney for Defendant.
PATRICK KISSANE,
Defendant.

[Endorsed]: Filed Jan. 20, 1925. *Nunc pro tunc* as of Jan. 14, 1925. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [97]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Wednesday, the fourteenth day of January, in the year of our Lord one thousand nine hundred and twenty-five. Present: the Honorable JOHN S. PARTRIDGE, District Judge.

No. 15,708.

UNITED STATES OF AMERICA

vs.

WALTER BRAND et al.

MINUTES OF COURT—JANUARY 14, 1925—ORDER DENYING MOTIONS FOR NEW TRIAL AND IN ARREST OF JUDGMENT, etc.

This case came on regularly this day for further trial. Defendants Walter Brand, Joseph E. Marron, *alias* Eddie Marron, George Birdsall, *alias* Geo. Howard, Charles Mahoney, Patrick Kissane and Joseph Gorham were present with respective attorneys, H. Smith, Wm. Kelly, J. B. O'Connor, K. M. Green, Jos. L. Taaffe and Chas. Wiseman, Esqs. K. C. Gillis, Esq., Asst. U. S. Atty., was present for and on behalf of United States. The jury heretofore impaneled and sworn to try defendants was present and complete.

Court instructed jury, who, after being so instructed, retired at 11 A. M., to deliberate upon a verdict. Ordered that U. S. Marshal furnish jury and two bailiffs with lunch at expense of United States. Jury returned at 4:50 P. M. and upon being called all twelve (12) jurors answered to their names and were found to be present and, in answer to question of the Court, stated they had agreed upon a verdict and presented a written verdict, which the Court ordered filed and [98] recorded, viz.: "We, the Jury, find as to the de-

fendants at the bar as follows: Walter Brand, Not Guilty. Joseph E. Marron, Guilty, George Birdsall, Guilty. Charles Mahoney, Guilty, with a recommendation that leniency be shown and a fine only be imposed. Patrick Kissane, Guilty. Joseph Gorham, Guilty. Alfred P. Fisher, Foreman." Ordered Jurors discharged from further consideration of case and from attendance upon Court until Jan. 26, 1925, at 10:30 A. M.

ORDERED that defendant Walter Brand be discharged and go hence without day, and that the bond heretofore given for his appearance herein be and same is hereby exonerated.

Thereupon defendants Joseph E. Marron, George Birdsall, Charles Mahoney, Patrick Kissane and Joseph Gorham were called for judgment. Counsel for respective defendants moved the Court for new trial on behalf of each of said defendants. Ordered motions denied and to which order exceptions were entered. Counsel likewise moved the Court in arrest of judgment, which motions the Court denied and to which order exceptions were entered.

No cause appearing why judgment should not be pronounced,—

ORDERED that defendant Joseph E. Marron be imprisoned for period of 2 years and pay a fine in sum of $10,000.00 or, in default thereof, defendant be further imprisoned until said fine is paid or he be otherwise discharged by due process of law;

ORDERED that defendant George Birdsall be imprisoned for period of 13 months and pay fine in

sum of $1000.00 or, in default thereof, defendant be further imprisoned until said fine is paid or he be otherwse discharged by due process of law; [99]

ORDERED that defendant Patrick Kissane be imprisoned for period of 2 years and pay fine of $1,000.00 or, in default thereof, defendant be further imprisoned until said fine is paid or he be otherwise discharged by due process of law;

ORDERED that defendant Joseph Gorham be imprisoned for period of 2 years and pay fine in sum of $2,500.00 or, in default thereof, defendant be further imprisoned until said fine is paid or he be otherwise discharged by due process of law.

ORDERED that said judgments of imprisonment be executed upon said defendants Joseph E. Marron, George Birdsall, Patrick Kissane and Joseph Gorham by imprisonment in the United States Penitentiary at Leavenworth, Kansas, and that said defendants stand committed to custody of U. S. Marshal for this District to execute said judgments of imprisonment, and that commitments issue.

FURTHER ORDERED that defendant Charles Mahoney pay fine in sum of $500.00 or, in default of payment thereof, defendant be imprisoned in county jail, county of San Francisco, State of California, until said fine is paid or he be otherwise discharged by due process of law; and that, in event of imprisonment, defendant stand committed to custody of U. S. Marshal to execute said judgment, and that a commitment issue.

Vol. 64 at page 441. [100]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 15,708.

THE UNITED STATES OF AMERICA

vs.

JOSEPH E. MARRON, *alias* EDDIE MARRON, GEORGE BIRDSALL, *alias* GEORGE HOWARD, CHARLES MAHONEY, PATRICK KISSANE and JOSEPH GORHAM.

JUDGMENT ON VERDICT OF GUILTY.

Conv. of Conspiracy to Violate National Prohibition Act. Violation Sec. 37 C. C. U. S. and Act Oct 28th, 1919.

Kenneth C. Gillis, Esq., Assistant United States Attorney, and the defendants with their counsel came into court. The defendants were duly informed by the Court of the nature of the indictment filed on the 17th day of October, 1924, charging them with the crime of Violation Sec. 37 C. C. U. S. and Act October 28, 1919, National Prohibition Act; of their arraignment and plea of not guilty; of their trial and the verdict of the jury on the 14th day of January, 1925, to wit:

"We, the Jury find as to the defendants at the bar as follows: Walter Brand, Not Guilty; Joseph E. Marron, Guilty; George Birdsall, Guilty; Charles Mahoney, Guilty; with a recommendation that leni-

ency be shown and a fine only be imposed; Patrick Kissane, Guilty; Joseph Gorham, Guilty.

ALFRED P. FISHER,
Foreman."

The defendants were then asked if they had any legal cause to show why judgment should not be entered herein and no sufficient cause being shown or appearing to the Court, and the Court having denied a motion for new trial and a motion in arrest of judgment; thereupon the Court rendered its judgment;

THAT WHEREAS, the said Jos. E. Marron, George Birdsall, Chas. Mahoney, Patrick Kissane and Joseph Gorham having been duly convicted in this Court of the Crime of Cons. to Violate National Prohibition Act (Violation Sec. 37 C. C. U. S. and Act of Oct. 28th, 1919)

IT IS THEREFORE ORDERED AND ADJUDGED that the said Joseph E. Marron be imprisoned for the period of two (2) years and pay a fine in the sum of Ten Thousand ($10,000.00) Dollars, that Patrick Kissane be imprisoned for the period of two (2) years and pay a fine in the sum of One Thousand ($1,000.00) Dollars, that Joseph Gorham be imprisoned for the period of two (2) years and pay a fine in the sum of Twenty-five Hundred ($2500.00) Dollars, that George Birdsall be imprisoned for the period of Thirteen (13) months and pay a fine in the sum of One Thousand ($1000.00) Dollars; further ordered that in default of the payment of said fine that defendant so in default be further imprisoned until said fine be

paid or until he be otherwise discharged in due course of law. Terms of imprisonment to be executed upon said defendants by imprisonment in the United States Penitentiary at Leavenworth, Kansas. That defendant Charles Mahoney pay a fine in the sum of Five Hundred ($500.00) Dollars, further ordered that in default of the payment of said fine that defendant be imprisoned in the County Jail, County of San Francisco, California, until said fine be paid or until he be otherwise discharged in due course of law.

JUDGMENT ENTERED this 14th day of January, A. D. 1925.

WALTER B. MALING,
Clerk.
C. W. Calbreath,
Deputy Clerk.

Entered in Vol. 18, Judg. and Decrees, at page 65. [101]

In the District Court of the United States for the Northern District of California, First Division.

No. 15,708.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GEORGE HAWKINS et al.,
Defendants.

PRESENTATION OF BILL OF EXCEPTIONS AND NOTICE THEREOF.

The defendants Joseph E. Marron, George Birdsall, Patrick Kissane and Joseph Gorham hereby present the following as their bill of exceptions, and respectfully ask that the same be allowed.

CHAS. J. WISEMAN,
HUGH L. SMITH,
Attorneys for Joseph E. Marron and George Birdsall.

JOS. L. TAAFFE,
Attorney for Patrick Kissane.
WILLIAM A. KELLY,
Attorney for Joseph Gorham.

To STERLING CARR, Esq., U. S. Attorney for the Northern District of California, Attorney for Plaintiff:

You will please take notice that the foregoing constitutes and is the proposed bill of exceptions of the defendants Joseph E. [102] Marron, George Birdsall, Patrick Kissane and Joseph Gorham in the above-entitled cause, and that said defendants will ask for the allowance of the same.

CHAS. J. WISEMAN,
HUGH L. SMITH,
Attorneys for Joseph E. Marron and George Birdsall.

JOS. L. TAAFFE,
Attorney for Patrick Kissane.
WILLIAM A. KELLY,
Attorney for Joseph Gorham. [103]

In the District Court of the United States for the Northern District of California, First Division.

No. 15,708.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE HAWKINS et al.,

Defendants.

ENGROSSED BILL OF EXCEPTIONS OF JOSEPH E. MARRON, GEORGE BIRDSALL, PATRICK KISSANE AND JOSEPH GORHAM.

BE IT REMEMBERED, That on the 5th day of January, 1925, at a stated term of the District Court of the United States for the Northern District of California, First Division, the above-entitled cause came on regularly for trial before Hon. John S. Partridge, United States Judge presiding; Sterling Carr, Esq., District Attorney for the Northern District of California, and Kenneth G. Gillis, Esq., Special Assistant to the United States Attorney for the Northern District of California, appearing for the plaintiff; Hugh L. Smith, Esq., and Charles J. Wiseman, Esq., appearing for the defendants Joseph E. Marron and George Birdsall; Joseph L. Taaffe, Esq., appearing for the defendant Patrick Kissane; and William A. Kelly, Esq., appearing for the defendant Joseph Gorham.

Thereupon a jury was empaneled and sworn according to law and, opening statements having been made to the jury by counsel for the prosecution, the evidence hereinafter following was introduced and the following proceedings occurred: [104]

TESTIMONY OF D. E. MOCKER, FOR THE GOVERNMENT.

D. E. MOCKER, a witness called for the United States, and sworn, testified as follows:

Direct Examination.

(By Mr. GILLIS.)

My name is Mr. Mocker. At the present time I am the solicitor employed by Umbsen, Kerner & Stevens. From October 1, 1923, to October 1, 1924, I was employed as a collector and solicitor by the same concern. During that time I collected rent from the premises 1249 Polk Street, City and County of San Francisco, State of California. I started to collect rent on these premises around 1922. The first tenant I collected from was a man by the name of Hay. There were two or three other tenants later, and then there was a tenant named Hawkins.

Q. Do you remember when he was in there, approximately?

A. No, I would not say offhand. I have got the books right there.

Q. Do your records show here? A. Yes.

Q. Are these the records of Umbsen, Kerner & Stevens? A. Yes.

(Testimony of D. E. Mocker.)

Q. Are they a record of the collections of rents of 1249 Polk Street? A. Yes.

Mr. SMITH.—I would like to ask the witness a few questions before we proceed.

The COURT.—Yes.

Mr. SMITH.—Q. Did you make these records yourself? A. No.

Q. Who did make the records?

A. We have a regular bookkeeper in charge of it. [105]

Q. Do you know whether these records represent a true account of the records?

A. Everything is kept right up to date in this office.

Q. You never made the entries? A. No.

Q. You were not present when they were made?

A. I know they were made from my copies.

Q. But you were not present when they were made?

A. No. The only reason I was looking at this was to establish the time that Hawkins went in.

Mr. SMITH.—We will object to any testimony from this witness regarding these records on the ground that he is not qualified as a person who is able to testify that the records are true and correct records of the business conducted at this place.

The COURT.—Overruled.

Mr. SMITH.—Note an exception.

Mr. O'CONNOR.—As to the defendant Mahoney, we object on the ground that the proper foundation has not been laid for the introduction.

(Testimony of D. E. Mocker.)

Mr. GILLIS.—We have not introduced them yet.

The COURT.—Overruled.

A. Do you want the time Mr. Hawkins went in?

Mr. GILLIS.—Q. Glance at your record there and see if you can tell at what time Hawkins went in.

Mr. SMITH.—May we see the record first?

A. I will explain—

Mr. GILLIS.—Just a moment; without explanation, let him look at them first.

Mr. SMITH.—We make the further objection that there is nothing in the records to show that they represented a record of rents [106] collected from 1249 Polk Street.

The COURT.—Overruled.

Mr. SMITH.—Exception.

Mr. O'CONNOR.—Do you want him to look at the records for the purpose of refreshing his recollections?

Mr. GILLIS.—Yes.

The WITNESS.—That is the way I took the question.

Mr. O'CONNOR.—We will object.

The COURT.—Of course, the records of a business house as to the business transactions—those were made in the regular course of business?

A. Absolutely.

The COURT.—Under the most elementary principles of law that evidence is admissible. Why spend time on that?

(Testimony of D. E. Mocker.)

Mr. SMITH.—May it please the Court, one of the elementary principles that we are dealing with now is the proper way to present records and produce evidence.

The COURT.—I have ruled. Let us have the answer.

A. The first entry we have in the name of Hawkins was May 1, 1922.

The WITNESS.—(Continuing.) The rent was paid under the name of Hawkins first in May, 1922, and last in November 1923. After I collected the rent from Mr. Hawkins, I then collected it from Mr. Marron. I would say roughly that I collected rent from Mr. Marron for a period of about a year or less. I didn't always collect from him personally. The first two or three months I did. Towards the end I doubt whether I collected one-third of the rents. The Mr. Marron I refer to is the defendant in this [107] case. The rent was $100 a month, and was paid me in currency. When I would go to the premises someone would come to the head of the stairs, open the door, and I would tell them what I wanted and they would go and bring me the money. After Mr. Marron stopped paying the rent, Mr. Mahoney generally paid me the rent. Nobody besides Marron or Mahoney paid me the rent at these premises.

Cross-examination.

(By Mr. SMITH.)

During the month of September and October, 1924, Mr. Mahoney paid the rent. It was generally

(Testimony of Walter Stevens.)

paid around the first or second of the month, and Mahoney is the only person that I saw there during the last two or three months.

(R. Tr. Vol. 1, pp. 4–10, inc.)

TESTIMONY OF WALTER STEVENS, FOR THE GOVERNMENT.

WALTER STEVENS, a witness called for the United States, and sworn, testified as follows:

Direct Examination.

(By Mr. GILLIS.)

My name is Walter Stevens. I am a real estate *a real estate* agent connected with the firm of Umbsen, Kerner & Stevens, and have been so for about twenty years. I have a record of leases and contracts for leases on 1249 Polk Street during the years 1923 and 1924. They are contained in these books. The one I am now turning to is signed by George Hawkins. It is a lease for 1249 Polk Street, for one month, on a month to month basis. It is dated March 30, 1922, renting the premises on a month to month basis. [108]

Mr. GILLIS.—I have a photostatic copy of this, and if you have no objection upon that ground I will ask that it be introduced in evidence in place of the original, so that Mr. Stevens may take the book.

Mr. SMITH.—We will object to the introduction of the original upon the ground that it is immaterial, irrelevant and incompetent, there is no

(Testimony of Walter Stevens.)

foundation laid for the introduction of it, there has been no conspiracy shown to have existed between Hawkins and any other of the defendants. Hawkins is absent, so we cannot interpose any objection for him. We do not know where Hawkins is, he is not a defendant here.

The COURT.—Objection overruled. Have you any objection to the photostat copy being introduced instead of the original?

Mr. SMITH.—No, if it is a true copy we have no objection.

Mr. O'CONNOR.—On behalf of the defendant Mahoney we will object to its introduction on the ground that the instrument antedates the date the conspiracy is set forth in the indictment.

The COURT.—Overruled.

Mr. O'CONNOR.—Exception.

Mr. GILLIS.—I will ask that it be introduced in evidence and marked "U. S. Exhibit 1."

(The document is here introduced in evidence as "United States Exhibit 1.")

The WITNESS.—(Continuing.) The next lease on 1249 Polk Street is signed by Ed Marron and dated November 2, 1923.

(Said document was here introduced in evidence as "United States Exhibit 2.") [109]

Mr. SMITH.—We will object to the introduction of that one offered upon the same grounds urged to the introduction of the first.

The COURT.—Overruled.

Mr. SMITH.—Exception.

(It was here stipulated that a photostatic copy of the United States Exhibit 2 be introduced in evidence in the place and stead of the original.)

The COURT.—Is there any materiality to it except the fact that it was signed?

Mr. GILLIS.—Except the fact that it is to be used for a dwelling, and there are some notations at the bottom that I thought should be called to the jury's attention.

Mr. SMITH.—The jury is entitled to the whole thing, not a part of it.

The COURT.—You know, Mr. Smith, that these leases contain mostly formal matters. Why take the time to read it? Put in the part you want.

Mr. GILLIS.—At this time I wish to call the jury's attention to this lease which is dated November 2, 1923, for 1249 Polk Street: "The undersigned agrees not to sublet nor to assign this lease, nor directly or indirectly to use or allow the said premises to be used for any other purpose than a dwelling."

(Discussion between court and counsel.)

Mr. GILLIS.—(Continuing.) "Paid to November 1 under Hawkins' name. Takes place of Hawkins. This party has already been in possession of flat for three months. Deposit $100. Adults 3, children 2."

Mr. O'CONNOR.—As far as the defendant Mahoney is concerned, we move that that part of the document which has just been read [110] to the jury go out, as it clearly shows on the record that it

(Testimony of Chester A. Howard.)

is the notation of the office of Umbsen, Kerner & Stevens, made after the signing of the lease, not binding upon the defendant.

Mr. SMITH.—May the same objection be interposed for Marron and for Birdsall?

The COURT.—Yes. Overruled.

Mr. SMITH.—Note an exception.

(R. Tr. Vol. 1, pp. 10–13, inc.) [110½]

TESTIMONY OF CHESTER A. HOWARD, FOR THE GOVERNMENT.

CHESTER A. HOWARD, a witness called for the United States, and sworn, testified as follows:

Direct Examination.

(By Mr. GILLIS.)

I am a Federal Prohibition Agent, and have been since April, 1924. I had occasion to visit 1249 Polk Street on about September 22, 1924.

Q. Did you purchase any drinks there?

Mr. O'CONNOR.—We object to that on the ground that it is immaterial, irrelevant and incompetent; thus far there has been no foundation laid for it, and the *prima facie* case of conspiracy has not been established, and it is one of the overt acts alleged in the indictment, and it is inadmissible until the *prima facie* case of conspiracy has been shown.

The COURT.—Overruled.

Mr. SMITH.—May that objection apply to all the defendants, and an exception to the ruling of the Court.

(Testimony of Chester A. Howard.)

The COURT.—Yes.

The WITNESS.—(Continuing.) I purchased fifteen drinks of whiskey, bought for four people and myself. You enter these premises at the foot of the stairs, the door on the outside, next to the sidewalk, by ringing three bells they admit you to the place, and you go up one flight of stairs, and there is a long hall there which several rooms lead off of, and we were shown into one of the front rooms, one of the front rooms of the flat or apartment, that are fitted up for bootlegging purposes and the like of that. [111]

They had in this room a Chesterfield set, a table, a victrola, a piano, and just ordinary house fixtures. The drinks were served in whiskey glasses off of a tray. I have a description of the person who brought the drinks to us. I believe I would recognize the person if I saw him. The party on the end of the row of people over there fits the description. The description is five feet seven inches, 155 to 165 pounds, large nose, high cheek-bones and deep set eyes, age 47. The person I refer to over there is Mr. Brand. That is not the only time I have been in the place. I went there with a raiding squad on the 2d of October. I did not purchase drinks there other than the time I have testified to.

Cross-examination.

(By Mr. GREEN.)

The date of the purchase was September 22, 1924. I positively identify Mr. Brand as the man I pur-

(Testimony of Chester A. Howard.)

chased whiskey from in those premises. I could not be mistaken about it. I am not picking him out because he has come here under that description. I remember his face. It was about 4:15 P. M. He served the drinks in the front room. I am not identifying him just because the description merely fits him.

(R. Tr. Vol. 1, pp. 13–16, inc.)

TESTIMONY OF W. F. WHITTIER, FOR THE GOVERNMENT.

W. F. WHITTIER, a witness called for the United States, and sworn, testified as follows:

Direct Examination.

(By Mr. GILLIS.)

I am a Federal Prohibition Agent, and have been such [112] for a little over six months. I was present on the raid at 1249 Polk Street on or about October 2, 1924. Agents Lee, Eldredge and Howard, and the driver of the automobile, Camona, were with me at the time.

Q. Did you go into 1249 Polk Street?

A. I did.

Q. Did you have a search-warrant for the place?

A. We did.

Q. Did you find any liquor there at that time?

Mr. SMITH.—Just a moment, may it please the Court: The Court recalls that heretofore there have been several motions made for the exclusion of evidence. Now, will the Court consider as having been

(Testimony of W. F. Whittier.)

made, for the purpose of the record, a renewal of the motions at this time with reference to the raid of 1249 Polk Street on the 2d of October?

The COURT.—Yes, although I think, Mr. Smith, that technically it should come now in the form of an objection to the introduction of the evidence. Do not you so understand the rule?

Mr. SMITH.—Yes, that is correct, as I understand the rule. We object to the introduction of any testimony, or any evidence, upon the same identical grounds that we urged in our petition for the suppression of evidence; that petition is on file, and is a part of the records.

The COURT.—Overruled.

Mr. O'CONNOR.—May we similarly object as to the defendant Mahoney?

The COURT.—Yes.

Mr. O'CONNOR.—Exception.

Mr. SMITH.—Exception.

The COURT.—You may answer. [113]

A. Yes, we found liquor there.

Mr. GILLIS.—Q. What did you find?

A. We found 16 pint bottles of champagne in a closet, in the front room, in a trap, and in that same little closet we found a gray ledger, a gray book, nine one-fifth gallon bottles of white wine, five one-fifth gallon bottles of whiskey, two quart bottles of whiskey, one one-fifth gallon bottle of gin, three-quarters full, one-fifth gallon bottle full of gin, two bottles Bacardi rum, one one-fifth gallon bottle of brandy, two one-fifth gallon bottles of Scotch whis-

(Testimony of W. F. Whittier.)

key, one one-fifth gallon bottle one-half full of Scotch whiskey, one bottle of Vermuth, one bottle picon, one-third full, one one-gallon bottle three-quarters full of gin, eight bottles sweet wine, one bottle one-third full of whiskey, one one-gallon bottle one-sixth full of sweet wine, two sacks of Canadian beer, and 174 bottles of home brew beer.

Q. Did you make a thorough search of the place?

A. Yes.

Q. Did you go through all the rooms?

A. Yes.

Q. How were these rooms fitted up?

A. They were fitted up with a table in them; in fact, we found people sitting at a table when we were there.

Mr. SMITH.—I will ask that that go out as not responsive, being purely voluntary.

The COURT.—Strike it out.

Mr. GILLIS.—Q. State the furniture that was in the different rooms? A. Tables and chairs.

Q. Tables and chairs? A. Yes.

Q. Anything else?

A. I think in the front room there was a [114] davenport, in one room, if I am not mistaken.

Q. Did you see any bed? A. No.

Q. Who did you see there at that time that was in charge of the premises, if anyone?

A. Mr. Birdsall.

Q. Mr. Birdsall, one of the defendants in this case? A. Yes.

Q. Anybody else? A. At that time?

(Testimony of W. F. Whittier.)

Q. Yes. A. That is all.

Q. October 2d? A. Yes, that is all.

Q. I will show you a book, Mr. Whittier, and ask you to look at it; do not make any statements with reference to it until you have looked at it?

A. That is the book.

Q. I ask you if you recognize that book?

A. Yes.

Q. When did you first see that book?

A. When we got—

Q. When did you first see this book?

A. When we went in, Agent Howard and I went in to where we found the champagne in the closet, in the front room.

Q. It was on October 2, 1924? A. Yes.

Q. At 1249 Polk Street? A. Yes.

Q. Just where did you find this book?

A. In those premises, in that closet, there is a washstand, and this book was on the washstand under the cigar box, with a lot of currency in it.

Q. Was the closet locked?

A. Yes, the closet was locked.

Q. Was there anything else in the closet or on the floor of the closet?

A. Just the cigar box that was full of currency and the champagne that was in the trap in the floor.

Q. This was off one of the rooms, was it?

A. It was in one of the rooms, the front room.

Mr. GILLIS.—I offer this book in evidence and ask that it be marked U. S. Exhibit 3. [115]

(Testimony of W. F. Whittier.)

(Thereupon the book was here introduced in evidence as United States Exhibit 3.)

Said exhibit was and is in the following words and figures, to wit:

(Here insert exhibit.)

Mr. SMITH.—To which, of course, we will object.

The COURT.—You can ask your questions first.

Mr. SMITH.—Q. Mr. Whittier, I show you a paper, and I will ask you if you have ever seen that before?

The COURT.—What is that, the search-warrant?

Mr. SMITH.—That is the search-warrant.

The COURT.—The search-warrant that was served at the time?

Mr. SMITH.—Yes, it is a copy of the search-warrant, your Honor.

Q. What is that paper?

The COURT.—It identifies itself. Do you want to put it in evidence?

Mr. SMITH.—No, I do not as yet.

Q. It is a copy, is it not, of the search-warrant that you executed on the 2d of October, on 1249 Polk Street? A. Yes.

Q. You were fully advised as to the contents of the warrant at the time that you served it, were you not? A. We were.

Q. You know, do you not, that the search-warrant only authorized the search of those premises for certain liquors?

Mr. GILLIS.—I object.

The COURT.—Doesn't it speak for itself?

Mr. SMITH.—Yes, it does.

The COURT.—Why spend time on it?

Mr. SMITH.—I want to show this witness was thoroughly familiar with the contents of the warrant.

The COURT.—It does not make any difference whether *or* was or [116] not; if it was a valid search-warrant, authorizing the taking of this book, it speaks for itself; if not, it does not make any difference whether he knew it or not.

Mr. SMITH.—At this time we will ask that all testimony elicited by the Government from this witness with reference to this gray book be stricken out on the ground that it is immaterial, irrelevant and incompetent, there is no foundation for it, and the warrant did not authorize the seizure of that record.

The COURT.—Was this included in your motion before?

Mr. SMITH.—Yes, your Honor, that was one of the motions.

The COURT.—Overruled.

Mr. SMITH.—May the objection, for the purpose of the record, show that this book was not described nor designated in the warrant as one of the things to be searched or seized?

The COURT.—The warrant is in evidence and speaks for itself.

Mr. SMITH.—I want the record to show what my objections are.

The COURT.—Yes.

Mr. SMITH.—Furthermore, in the case of United States vs. Gouled, the Supreme Court of the United States held that a man's records, or books, or papers could not be used as evidence against him, because it would be tantamount to telling the man to take the witness-stand against himself; in either event, whether his records are used, or whether he is compelled to take the stand as against himself, he is an unwilling source of information concerning his actions. Now, we submit that it is directly in violation of his constitutional guarantee; that is the second ground. The first ground is that it was unlawfully taken under the warrant.

The COURT.—Overruled. [117]

Mr. SMITH.—Exception.

Mr. O'CONNOR.—As to the defendant Mahoney, we object on the ground that it was in violation of his rights under the Fourth and Fifth Amendments to the Constitution, was seized without search-warrant, and compels him to be a witness against himself.

The COURT.—Overruled.

Mr. O'CONNOR.—Exception.

Mr. TAAFFE.—In so far as the defendant Kissane is concerned, we will interpose the objection at this time that it is immaterial, irrelevant and incompetent, and no proper foundation has been laid, and, furthermore, that there has been no attempt at all made by the Government to connect Kissane with this book in any manner whatsoever.

(Testimony of W. F. Whittier.)

The COURT.—Overruled.

Mr. TAAFFE.—Exception.

Mr. KELLY.—On behalf of the defendant Gorham, the book is objected to on the ground that it is immaterial, irrelevant and incompetent, hearsay as against him, no foundation has been laid for the introduction of this book in evidence against him, upon the ground that there is no evidence before this Court that he ever conspired or confederated in accordance with the allegations of the indictment.

The COURT.—Overruled.

Mr. KELLY.—Exception.

Mr. SMITH.—May the record show an exception to all of your Honor's rulings?

The COURT.—Yes.

Mr. GILLIS.—Q. Mr. Whittier, did you see any patrons in that [118] place at that time?

A. Yes.

Q. How many, would you say?

A. I should say a dozen men and women.

Q. What were they doing in there, as far as you could see? A. Drinking.

Q. What? A. Whiskey.

Q. Did you have any conversation with Mr. Birdsall at that time? A. Yes.

Q. What was that conversation?

A. He stated that he owned the place, and gave the name of Howard.

Q. At that time?

A. Yes; he stated he owned the place; he said he bought it out recently from Marron.

(Testimony of W. F. Whittier.)

Q. Anything else? A. Not at all.

Q. Did you have any talk with him at all with reference to the book that has been introduced in evidence?

A. He wanted us to leave the book, did not want the boys to take the book; I left the book on the dining-room table while I was making out the warrant, and Howard, I believe, grabbed the book up at the time to hold it, and he says, "Can't you leave the book here?" and I said "No, we have to take it."

The COURT.—Let the search-warrant be marked in evidence as having been used upon Mr. Smith's objection.

Mr. SMITH.—Let the record show that the copy of the search-warrant was introduced in evidence by the defendant first.

(Thereupon the search-warrant was here introduced in evidence as Defendants' Exhibit "A.")

Said exhibit was and is in the following words and figures, to wit: [119]

(Here insert exhibit.)

The COURT.—The book is in evidence, Mr. Gillis; it is not very informing to the jury lying there on the table.

Mr. GILLIS.—There was a question in my own mind whether I should take the time of the jury at this time to call attention to the book.

Mr. SMITH.—Just a moment; may it please the Court, at this time I will object on behalf of the defendants that I represent to the contents of this

book being read to the jury, for the reason that no foundation has been laid, and upon the further ground that it is immaterial, irrelevant and incompetent; there has been nothing done with the book to identify it or show what the entries are, or anything of that sort.

The COURT.—Overruled.

Mr. SMITH.—Exception.

Mr. O'CONNOR.—As to the defendant Mahoney, it is objected to on the ground it is hearsay.

The COURT.—The same ruling.

Mr. O'CONNOR.—Exception.

(Thereupon a short recess was taken.)

Mr. GILLIS.—I will call your attention, gentlemen, to a few of the things in this book. For instance, on page 21 I call your attention to the fact, first, of an item here, "E. Marron, $500, rent $100, W. Brand $400." Then on page 31 we have, "W. Brand $408.97, E. Marron $603.08." Then we go to page 36, and we have at the top here, "Bird," with a list of notations under it, and here, lower down, "18/23, Birdsall drew," with "20" after it, crossed out, "Drew" underneath that, "20, 20, 20." On page 46 we again have the name "Birdsall." On page 54 we again have the name "Birdsall, Mahoney," with different items listed underneath. On page 61 abbreviated, "Bird" and "Mah" on the other side, "Mahoney" written out there. Page 69, we have [120] "Birdsall, Mahoney, Birdsall, Birdsall." On 75 we have "Mah" again, and "Bird"; here are two Birdsalls; on 81

we again have "Mah" and "Birdsall," 87 again the same thing appearing, "Mah," "Bird"; on page 93 the same, listed in the same way; 99, a similar notation; on 105 we have "Geo.," and "Chas." there, the first name. I call your attention to page 107 on which appears a summary of the profit and loss for September, 1924, showing sales of $5624.50, Cigar sales $5.65, Slot machines, $254, Total $5884.15, with a gross profit of $2552.55, and expenses, salaries, rents, and then a blank space filled with cross marks, $170, Profit $1187, and we have then the initials "E. M. $600," "Balance to divide $587.10"; again, "One-half E. M. $293.55, one-half G. B. $295.55." Then I will call your attention to page 34, an item in the center of the page after "17/23," which is marked "Gift Kissane," and above the word "Kissane" is written the word "Police." Then on page 51 we have the word in center of the page, "Police $100," and the word "Kissane $5." On page 60 we again have Kissane on the 10th, $5; on page 68, for March, we again have, on March 23, "Kissane $5"; 9th, "Kissane $5"; on the 16th, $5., on the 23rd, $5; and on the 30th "Kissane $5." On page 74, for the month of April, we have on the 6th, "Kissane $5," on the 13th marked "Gift $5, on the 20th Gift $5, on the 27th Kissane $5. On page 80 for the month of May we have on the 4th $5, on the 11th $5, on the 25th $5, and on the 17th "Kissane $5." Then on page 86, for the month of June, we have June 1, "Kissane $5," on the 8th, "Kissane $5," on the 15th "Kissane $5," on the 22d, "Police $15." On page 92, for July,

we have on the 6th*m* "Kissane $5, on the 13th "Kissane $5*m*" on the 20th, "Kissane $5," on the 27th, "Kissane $5." On page 98 [121] for the month of August we have on the 3d, "Kissane $5," on the 10th, "Kissane $5," on the 16th "Kissane $5," and on the 24th "Kissane $15." On page 104 for the month of September we have on the 21st, "Kissane $15," on the 28th "Kissane $5." Now I call your attention to page 69, and an item marked on page 69, toward the bottom of the page "Gift, $60," and underneath, as a matter of fact, the last item—this is for March, 1924, "New police $90." On page 74 we have "Gift $90," on the 16th, and on the 27th we have "Gift $60." On page 80, we have "Police," on the 22d, "$90," and on the 26th "Police $60." On page 86 we have on the 14th of June, "Police $150." On page 92 we have "Gift $150." On page 98 we have "Gift pl. $150." That is August 11. On page 104, September 15, we have "Gift $150." I call your attention to page 103, which gives a list of the stock that they had on hand at the end of September of that year, including whiskey, rum, sherry, and gin. I call your attention to page 101, which is the profit and loss statement for August, 1924, showing a net profit of $796.95, E. M. $620, balance $176.65; underneath that "½ E. M. $88.33, ½ G. B. $88.32." The same kind of a recapitulation for July, 1924, on page 94; also on page 71 for the month of March, which is a stock account, showing the different stock on hand at the end of March. On page 64, February 29, stock on hand in-

cluding bourbon, Scotch, rye, Plymouth gin, Vermuth, brandy, beer, sherry.

Mr. O'CONNOR.—At this time, if your Honor please, I ask the Court to instruct the jury to disregard the items read from the book by Mr. Gillis as to the defendant Mahoney on the ground that they are immaterial, irrelevant and incompetent, hearsay, [122] no foundation laid for their introduction, and that there has thus far not been established a *prima facie* case of conspiracy as to the defendant Mahoney.

The COURT.—Motion denied.

Mr. O'CONNOR.—Exception.

Mr. SMITH.—I will ask for the same instruction with reference to the defendant Marron, also the defendant Birdsall.

The COURT.—The same ruling.

Mr. SMITH.—And upon the further ground that the record, itself, discloses nothing that is connected with the thing that is alleged to be a conspiracy; there is nothing to connect the record that has been read with the conspiracy that is charged.

The COURT.—Motion denied.

Mr. SMITH.—Exception.

Mr. TAAFFE.—I make a motion at this time to strike out all of the evidence that has been introduced with reference to the book, in so far as it might affect the rights of the defendant Kissane on the ground that it is immaterial, irrelevant and incompetent, and in so far as he is concerned is purely hearsay, and the proper foundation has not been laid for it.

The COURT.—Motion denied.

Mr. TAAFFE.—Note an exception.

Mr. KELLY.—Your Honor will note that I objected primarily to the introduction of this book in evidence on the ground that it was immaterial, irrelevant and incompetent, as against the defendant Gorham, that it was hearsay, and not binding upon him, and there was no proper foundation laid, in that there had been no evidence showing his connection with the other defendants in any conspiracy, confederation or unlawful agreement as set [123] forth in the indictment. I now ask that all of the evidence of this book, and each and every item read by the Government to the jury in the record from the book be stricken from the record as against the defendant Gorham on like grounds. Your Honor will note that during the reading of this record the word "Gorham" was not mentioned.

The COURT.—Of course, Mr. Kelly, it cannot hurt him. Of course if that was all the evidence that was to be produced, the motion for a directed verdict would follow, but you will realize, of course, the rule that in the orderly presentation of the case, the whole thing cannot be presented at once, and that the *corpus delicti*, while it has to be established, need not be established prior to the introduction in evidence.

Mr. KELLY.—I grant the point that the order of proof is in the sound discretion of the Court.

The COURT.—Motion denied.

Mr. KELLY.—Exception.

Mr. GILLIS.—One item that has been called to

(Testimony of W. F. Whittier.)

my attention, I still wish to call to the attention of the jury in this gray book, on page 92, the name "Gorham" appears, $60, with some lines drawn through it; on the top of page 93 "Gorham, $60," and on the same page, "Joe Gorham, $60."

Mr. O'CONNOR.—If your Honor please, I renew the motion I made as to the other items as to these items, with the understanding that it is overruled and an exception noted.

The COURT.—Yes.

Mr. SMITH.—May my motion be renewed in a like manner

The COURT.—Yes. [124]

Mr. KELLY.—In behalf of the defendant Gorham, I renew the motion, your Honor, and take an exception.

The COURT.—Yes.

Mr. GILLIS.—(To Witness.) Q. I show you a bottle numbered 27936. Is that one of the bottles seized on that occasion, October 2? A. Yes.

Q. To whom was the bottle delivered?

A. To the chemist.

Mr. GILLIS.—I ask that it be introduced in evidence for the purpose of identification.

Mr. O'CONNOR.—The same objection.

The COURT.—The same ruling.

Mr. O'CONNOR.—Exception.

(The bottle was marked "U. S. Exhibit 4 for Identification.")

Mr. GILLIS.—Q. I show you a bottle marked

(Testimony of W. F. Whittier.)

on the label 27937, and ask you if that is one of the bottles seized on the occasion of October 2?

Mr. O'CONNOR.—The same objection.

The COURT.—The same ruling.

Mr. O'CONNOR.—Exception.

A. Yes.

Mr. GILLIS.—Q. Was that delivered to the chemist, also? A. Yes.

Mr. GILLIS.—I ask that that be introduced in evidence for the purpose of identification.

Mr. O'CONNOR.—The same objection.

The COURT.—The same ruling.

Mr. O'CONNOR.—Exception.

(The bottle was marked "U. S. Exhibit 5 for Identification.") [125]

Mr. O'CONNOR.—May it be stipulated that we object to all of this line of examination?

The COURT.—The same objection to all of these bottles, and the same ruling as to each one.

Mr. SMITH.—Also as to the defendants Birdsall and Marron.

The COURT.—The same may go to each defendant.

Mr. SMITH.—And an exception noted as to each?

The COURT.—Yes.

Mr. GILLIS.—Q. I show you a bottle labeled 27938, and ask you if that is one of the bottles seized on October 2 at this place? A. Yes.

Q. Was that delivered to the United States Chemist? A. Yes.

(Testimony of W. F. Whittier.)

Mr. GILLIS.—I ask that this be introduced in evidence for identification and marked.

(The bottle was marked "U. S. Exhibit 6 for Identification.")

Q. I show you a bottle numbered 27939, was that seized at the same place, at the same time.

A. Yes.

Mr. GILLIS.—I ask that this be introduced in evidence for identification and marked "U. S. Exhibit 7."

(The bottle was marked "U. S. Exhibit 7 for Identification.")

Q. I show you a bottle numbered 27940, was that seized at the same time and place? A. Yes.

Q. And delivered to the United States Chemist?

A. Yes.

Mr. GILLIS.—I ask that that be introduced in evidence for the purpose of identification and marked Exhibit 8.

(The bottle was marked "U. S. Exhibit 8 for Identification.")

Mr. O'CONNOR.—You mean just for identification or in evidence.

Mr. GILLIS.—Introduced for identification. That is all. [126]

Cross-examination.

(By Mr. SMITH.)

I arrested Mr. Birdsall on that occasion. He was the only one of all the defendants mentioned here present on that occasion at that place.

(R. Tr. Vol. 1, pp. 16–30, inc.)

TESTIMONY OF A. P. RUMBURG, FOR THE GOVERNMENT.

A. P. RUMBURG, a witness called for the United States, and sworn, testified as follows:

Direct Examination.

(By Mr. GILLIS.)

I am a special agent in the Intelligence Unit of the Government, and have been connected with the Government for a little over three months. In October of this year I had a talk with the defendant Walter Brand. The date of the talk was October 10, 1924. Mr. Burford, special agent of the Internal Revenue, was present.

Mr. O'CONNOR.—We will object to any conversation between the witness and the defendant Brand, as to the defendant Mahoney, on the ground that this was after the consummation of the alleged conspiracy set forth in the indictment, and not binding on the defendant Mahoney, and ask that the jury be so instructed.

The COURT.—What is the date of the last raid?

Mr. O'CONNOR.—October 3, I think it is.

The COURT.—When was this conversation?

A. October 10.

Q. This indictment was returned on October 17. Was that after these defendants were all arrested?

A. I could not say it was [127] after all the defendants were arrested.

The COURT.—Of course, you know the rule, Mr. Gillis, that a statement made by one of the alleged

co-conspirators is only admissible if it is made before the termination of the conspiracy.

Mr. GILLIS.—Yes, your Honor.

The COURT.—Judge Bean's theory seems to be, and it seems to be backed up by the authorities, is that in any case the arrest of the alleged conspirators should be taken at the time of the termination of the conspiracy. However, the evidence is admissible as against Mr. Brand.

Mr. GILLIS.—Yes.

The COURT.—I will pass upon the other question, gentlemen, when the time arrives.

Mr. GREEN.—On behalf of the defendant Brand I object to the introduction of the statement on the ground that the *corpus delicti* has not yet been established.

The COURT.—That is overruled. Besides that, this is apparently directed at a confession, and if an extrajudicial confession, of course, it would not be sufficient to convict, but it is admissible just the same.

Mr. GREEN.—I know it is a question of discretion of the Court whether you admit it at this time, or not, but I think it is an attempt to convict the defendant Brand by his own statement and nothing else.

The COURT.—It could not be done. If there was no other evidence introduced against Mr. Brand, an extrajudicial confession would not be sufficient to convict him; but that does not render it inadmissible. If there is no other evidence against

(Testimony of A. P. Rumburg.)

Mr. Brand he would be acquitted without any trouble; but if there is other [128] evidence it might be considered by the jury. You may answer.

Mr. GREEN.—Exception.

The COURT.—As to the other defendants, I will rule on that when the time comes.

Mr. SMITH.—This, may it please the Court, I think is the proper time to interpose the objection that all of this evidence is inadmissible as to all of the other persons charged in the indictment for the reasons enumerated by my colleague, Mr. O'Connor; the authorities are uniform on the proposition.

The COURT.—There is no question about it, that a statement made after the termination of the conspiracy is not admissible, that is, it is not admissible against the other members of the conspiracy, or alleged conspiracy.

Mr. SMITH.—Yes.

The COURT.—But I cannot determine that now. If it should appear that this statement was made after the termination of the conspiracy, the jury will be instructed to disregard it as to all except Brand. You may answer.

A. I did.

Mr. GILLIS.—Q. Were they made at that time?

A. They were.

Q. Will you give us the conversation that you had with Mr. Brand at that time? You may use your notes to refresh your memory by if you so desire.

A. This was a statement volunteered by Mr.

(Testimony of A. P. Rumburg.)

Brand as to his residence, and as to his occupancy of the premises at 1249 Polk Street. (Reading:)

"State of California, County of San Francisco,—ss.

"On the 10th day of October, A. D. 1924, Walter Brand, being first duly sworn, upon his oath, deposes and says: [129]

"Q. You stated your name is Walter Brand?

"A. Yes, sir.

"Q. Where do you live Mr. Brand?

"A. 527 Faxon Ave., San Francisco.

"Q. When did you buy this property at 1249 Polk Street? A. July 26, 1923.

"Q. From whom did you purchase this property?

"A. A fellow by the name of George Hawkins.

"Q. You are sure that his name is George?

"A. Yes, sir, and otherwise known as Chick.

"Q. How much did you pay for this place?

"A. One thousand dollars.

"Q. How did you pay for this place?

"A. I paid five hundred dollars on July 26th and five hundred on August 26, 1923.

"Q. What did this property include?

"A. Furniture and fixtures, completely furnished five rooms and kitchen.

"Q. Do you still claim that belongs to you?

"A. No.

"Q. You ran this place entirely alone?

"A. Yes, sir, I borrowed the money to buy it.

"Q. Who loaned you the money to buy this place? A. Eddie Marron.

(Testimony of A. P. Rumburg.)

"Q. You paid this back to him from returns from the business? A. Yes, sir.

"Q. You conducted the sale of liquor at that address? A. Yes.

"Q. What kinds of liquor did you sell there?

"A. Different kinds, including whiskey and gin, beer.

"Q. You kept a book which showed receipts and expenditures in conducting this business?

"A. Yes, I kept a record of this in a book.

"Q. You would recognize this book if you would see it? A. Yes.

"Q. Is your handwriting in the book? A. Yes.

"Q. On pages two and twenty, 21, 22, 23, 24, 25, 26, 27, 28 and 29, except the headings on page two, seven, fifteen, twenty, twenty-two, twenty-three, twenty-four, twenty-five, twenty-six and twenty-seven, twenty-eight and twenty-nine, is that not your handwriting, Mr. Brand? [130]

"A. Yes."

Q. Just stop there a second, Mr. Rumburg; showing you Government's Exhibit 3, is that the book which you showed him at the time these questions were asked and that answer given with reference to the pages? A. Yes.

Q. And the numbers of the pages that are referred to in that statement, do they refer to the pages in this book, Government's Exhibit 3, which you now have in your hand? A. They did.

Q. Now, continue with your statement.

A. (Continuing reading:)

(Testimony of A. P. Rumburg.)

"Q. Whose handwriting is these headings?

"A. A man by the name of Frank Darrell wrote those. Mr. Darrell is now dead, having died January 10, 1924. He was formerly an accountant at the World's Fair at San Francisco.

"Q. The place was rented in the name of whom while you were there? A. George Hawkins.

"Q. Did you know his street address?

"A. I did not. He lived in the place before I bought him out.

"Q. You have not seen him since you purchased this place from him? A. No.

"Q. Did you discuss the matter of buying this place with Eddie Marron before you bought it?

"A. I did not.

"Q. Marron of course knew what you were going to do when you borrowed the money to buy the place? A. I could not tell you.

"Q. Marron came there to collect the money you owed him?

"A. Yes. He came there to collect money I owed him.

"Q. When did you open this joint account at the Bank of Italy?

"A. That was about August, 1923.

"Q. Prior to this time you turned receipts over to Marron? A. No.

"Q. Before opening this bank account what did you do with this money you took in?

"A. I kept it. [131]

(Testimony of A. P. Rumburg.)

"Q. This joint account was subject to whose check?

"A. Eddie Marron and Walter Brand.

"Q. This account was closed out about what date? A. About October 18th, 1923.

"Q. About when did you leave?

"A. About November 1, 1923.

"Q. Did anyone else come in, and on what date?

"A. A man I know by the name of George, and later I understood his name was Birdsall.

"Q. He was employed by Marron?

"A. Yes, I think so.

"Q. Do you know what salary he was to receive?

"A. I did not know until he had worked about fifteen or sixteen days, that he was receiving a salary of twenty dollars per day.

"Q. Marron informed you that he was giving him twenty dollars a day, after he had worked there about fifteen days? A. Yes.

"Q. Did Marron tell you that Birdsall was buying this place?

"A. He said Birdsall was taking charge of the place and then I quit. The bookkeeper Mr. Darrell came and balanced the books, and it was then I learned that Birdsall was getting twenty dollars per day. I asked Marron if he was paying him that amount out of my money, and I told Marron that I could not afford to pay that amount for help. After the books were balanced I stayed up there for a little more than a week and was taken sick and went to the hospital. I was confined in

(Testimony of A. P. Rumburg.)

bed for almost three months, and have never been in that place since.

"Q. Did Marron visit you at the hospital?

"A. Yes. After I was there about four days he came there to see me.

"Q. How many times did he visit you after that?

"A. He never came to see me again.

"Q. You stated there was no liquor on the premises when you took over this place?

"A. Yes. There was no liquor there.

"Q. You operated this place under another name, didn't you?

"A. I bought the place from Hawkins and I did not want to take the trouble to change the telephone, rent and other bills to my [132] name, so I conducted the business under the name of George Hawkins.

"Q. You kept the record in this book until October 18, 1923?

"A. Yes. After that I had nothing further to do with this book and have no knowledge of who kept the record in it. I threw this book in the closet just off the hallway.

"Q. In addition to paying back the money Eddie Marron loaned you did you split the profits of this business with him?

"A. No. I gave him some money when we closed out our joint account at the bank, which was the balance due on the loan.

"Q. Did you have any connection with the police

(Testimony of A. P. Rumburg.)

while operating at this place, or did they visit your place at any time?

"A. Absolutely not. The police did not know such a place was in existence.

"Q. Upon being requested by telephone to come to 310 Grant Building, you came and gave these foregoing statements voluntarily, without threats or duress? A. Yes, sir."

Then it is signed "Walter Brand." "Subscribed and sworn to before me this 10th day of October, 1924, at San Francisco, California. Archie D. Burford, Special Agent."

Q. That was a complete statement of what transpired at that time? A. Yes.

Mr. O'CONNOR.—At this time I would ask that the jury be instructed to disregard the statement just read by the witness as to the defendant Mahoney on the ground that it is a statement made by a co-conspirator after the consummation of the conspiracy.

The COURT.—I will reserve a ruling on that.

Mr. SMITH.—May the same motion be made as to all the other defendants?

The COURT.—Yes. [133]

Mr. TAAFFE.—We do not make any such motion.

Mr. KELLY.—The defendant Gorham makes no such motion.

(R. Tr. Vol. 1, pp. 31–39, inc.)

TESTIMONY OF W. E. BIVENS, FOR THE GOVERNMENT.

W. E. BIVENS, a witness called for the United States, and sworn, testified as follows:

Direct Examination.

(By Mr. GILLIS.)

I reside at 459 Turk Street, and have lived here about 25 years. During the latter part of 1923, and up to October, 1924, I visited 1249 Polk Street. It was a long time ago that I visited there. I cannot recall exactly, approximately a year and half ago; something like that, I don't know exactly who was running the place then. I purchased intoxicating liquor there. I could not exactly tell you during what period of time. Some time back. Possibly a year and a half back. I suppose it was whiskey that I purchased there. That is what I asked for. I suppose it was what I got. During September or October and November, 1923, I purchased liquor from two or three different persons. One of them was Birdsall and Mahoney, and another was Brand. That is all I remember of. I think they are the three defendants in this case. I recognize them as the same individuals. I would go there quite frequently. I don't know how often. I could not tell you. I guess once a week, sometimes twice a week, and maybe sometimes once in two weeks. I would not say that on each occasion that I went there I secured whiskey, because several times I did not. I had intoxicating liquor

(Testimony of W. E. Bivens.)

there quite frequently. I have seen Mr. Marron there and the other defendant in this case. I would say I saw them [134] about the latter part of last year, I think along in October; I don't know. I could not tell you positively if it was prior to October, 24. I think the first time I ever met Mr. Birdsall was in that place. I have known him for a long time. That would be probably sometime the latter part of 1923 or the latter part of 1924, this last year, I guess. I guess 1923. I possibly knew him seven or eight months of the time he was up in that place.

Cross-examination.

(By Mr. O'CONNOR.)

I am in the real estate business located at 306 Humboldt Bank Building. I don't remember when I first visited 1249 Polk Street. I could not tell you exactly within a month or so. I know I have been there quite often within the last year. I must have been in that place in November, 1923. I am positive of that. I could not say that was the first time in November, 1923, that I was there. I might have been there before. I went there quite often. Not every day, possibly two or three times a week. Sometimes once a week, sometimes maybe possibly two or three weeks I didn't go. I was subpoenaed in this case by the Government. I testified before the Federal Grand Jury with regard to this case. Prior to being called as a witness in this case, I talked the facts of the case over with the Govern-

(Testimony of W. E. Bivens.)

ment authorities. I think I talked them over with Mr. Gillis. Mr. Gillis came to my office for the first talk; one time he was alone, and the next time he had somebody with him. I think Mr. Gillis was the first Government officer that I talked to about this case. There was someone else came there. I could not swear whether it was him or not. Mr. Gillis wanted to know—my name was supposed to be in the paper—running down an investigation about who were frequenting that place, I suppose—wanted to find out who I was. I told him who I was. Neither Mr. Gillis [135] nor any other Government official at any time before I took the witness-stand here threatened me with prosecution if I failed to testify. At no time did they do that, nor did they promise that they would not prosecute me. I testified before the Federal Grand Jury with regard to this case. I was not told by any person that if I would testify before the Grand Jury that I would not be prosecuted. I was told I had my constitutional rights, and I needn't answer questions unless I wanted to. I signed a statement of what I testified to. I was not advised that if I did testify before the Grand Jury I would be granted immunity.

(R. Tr. Vol. 1, pp. 39–44, inc.)

Cross-examination.

(By Mr. GREEN.)

I visited these premises frequently and purchased drinks from different people there, from

(Testimony of W. E. Bivens.)

Brand, Mahoney and Birdsall. I can't tell definitely when it was that I purchased drinks from Brand. It has been so long ago I can't recall it. I was quite a regular customer on those premises. I saw Brand there before any of the other defendants. It must have been more than a year ago. I don't think I ever saw Brand there after November 1, 1923. I didn't see him around there in September or October, 1924 at all. I don't remember having visited those premises about September 22, 1924, or during the latter part of the month of September, 1924. It might have been around those dates. I don't remember dates. I visited those premises in the fall of 1924, and at that time bought drinks from Birdsall and Mahoney. I didn't see Brand around there at that time. I hadn't seen him there for about a year. I would not say exactly, but it was prior to that anyway. I know the defendant Brand fairly [136] well. I know of my own knowledge that he got out of that place in the fall of 1923. I remember something about the time he got out. I don't remember the date, because I didn't pay any attention to it. I don't think he ever had any connection with the place afterwards. I don't know where he works now. I remember that he went to a hospital when he got out of there, and was very sick. I was there the night he left, the night that he went to the hospital very sick. I don't know that he is working for an undertaking establishment in the city now. At any rate I can say with definiteness that I have

(Testimony of Rudolph Herring.)
not seen him around those premises for over a year.

(R. Tr. Vol. 2, pp. 46–48.)

TESTIMONY OF RUDOLPH HERRING, FOR THE GOVERNMENT.

RUDOLPH HERRING, a witness called for the United States, and sworn, testified as follows:

Direct Examination.

(By Mr. GILLIS.)

My name is Rudolph Herring. I reside at 1625 Polk Street. I conduct a bakery and restaurant business at No. 1233 Polk St. I have had occasion to visit 1249 Polk Street in November, 1923. At that time I saw Birdsall and Walter Brand at that place, the two defendants in this case. I purchased intoxicating liquor at that place—whiskey. I frequented that place during that time for about twenty days, fifteen or twenty days. During those fifteen or twenty days I would go in and purchase drinks, about six or eight times a day. At the time that I purchased drinks there I always purchased them from either Mr. Brand or Mr. Birdsall. It was always whiskey that I purchased. I saw Mr. Marron in there, not frequently, once in a while, that [137] is all.

Cross-examination.

(By Mr. GREEN.)

This occurred in the fall of 1923, in the month of November. I would judge it was from the 12th

(Testimony of Rudolph Herring.)

to the 30th of November. It might have been October, too. I might have been there, too, in October, but I don't think so. It would not refresh my memory at all on the point if I was told that Brand went to the hospital about the 1st of November and was there for about three months. I know that I purchased drinks from Mr. Brand. It was not in October; it was in November. I am very positive about that. I am not positive that I purchased liquor from the defendant Brand at those premises in the month of November, and particularly about the 28th, during all of that time I mean. From about the 13th on; maybe before that, but I say in November. I would go there on alternate days, and some days see Brand and some days see Birdsall. In the morning I used to get a drink from Brand; in the afternoon I got it from Birdsall. I hadn't been drinking since May of that year in those premises. I first started giving my patronage to those premises in the month of November. I never purchased drinks there until the 1st of November that I knew of. I might have been there in October, but I am not quite sure, because I don't think I had been drinking before the month of November. I had been on the water-wagon. I quit drinking in May, and fell off in November, and climbed back on November 30, and I have not touched a thing since. I started drinking about the 1st of November and quit on the 30th, and have not drank since. I testified before the

(Testimony of George W. Marsh.)
Grand Jury in this case, and at the time I did not sign a waiver of immunity.

(R. Tr. Vol. 2, pp. 48–51, inc.) [138]

TESTIMONY OF GEORGE W. MARSH, FOR THE GOVERNMENT.

GEORGE W. MARSH, a witness called for the United States, and sworn, testified as follows:

Direct Examination.

(By Mr. GILLIS.)

My name is George W. Marsh. I reside at 535 Fourth Avenue. My business is a building inspector. During the months of October and November, 1923, I had occasion to visit 1249 Polk Street. I purchased drinks of intoxicating liquor in that place, beer, gin and highballs. I suppose the highballs were made out of whiskey. I guess it was from Brand, Walter Brand at that time that I purchased the drinks. I also purchased drinks from Mahoney and Birdsall. I made the purchases from Mahoney and Birdsall during that year, and during 1924, some in 1924 also. I frequented the place almost up to the time it was closed, but I had been there only a few times in the last seven or eight months; maybe twice a month, or something like that. I purchased drinks during that period in 1924 from Mahoney or Birdsall. It was intoxicating liquor, supposed to be, that I purchased,—beer or whiskey.

(Testimony of George W. Marsh.)

Q. Did you ever see the defendant, Eddie Marron, there? A. Yes.

Q. Frequently or otherwise?

Mr. SMITH.—I don't want to clutter up the record, as I have already informed the Court, with a lot of objections, but questions of that sort are not only leading, but suggestive.

The COURT.—I don't think that is a leading question. I will overrule the objection.

Mr. SMITH.—Exception.

The WITNESS.—(Continuing.) Well, I guess earlier. I saw him [139] frequently, but toward the end I didn't see him, because I was not in there very often. In 1923 I went in that place maybe a couple of times a week, and after that a couple of times a month.

Cross-examination.

(By Mr. GREEN.)

I have known the defendant Walter Brand since I went into the place the first time, a little over a year ago, I think it was. I first started going there a little over a year ago. I could not tell you the exact date. It was the fall of 1923. The first one of the defendants that I saw there was Walter Brand, I think. After that he disappeared from the place. I didn't see him after the 1st of November at all. I never purchased any drinks from him there after the 1st of November. I didn't see him around the premises at all. I was there along in September of 1924, I think once or twice in that

(Testimony of George W. Marsh.)

month. I didn't see Brand there. I understood he was sick. I don't know whether he is employed in an undertaking parlor at the present time. I never saw him there during the year 1924 at all. I was not a regular patron of that place in 1924. In 1923 I was. I didn't testify before the Grand Jury in this case. I have never been prosecuted as a co-conspirator in this case. I have never been informed against, nor has there been a complaint filed against me, nor have I been arrested.

The WITNESS.—(To Mr. Smith.) I never saw Marron wait on anybody in that place. When I saw him he had his hat and coat on. He was in there, of course. I don't know what he was doing. He never served me with any liquor. I never bought any liquor from him. [140]

Cross-examination.

(By Mr. O'CONNOR.)

Since October 3, 1924, Mr. Parker was the first Government agent or official that I have talked to about this case. I don't know when that was. It was one evening—I could not give you the date. I was called down to the Federal offices. It was during October, 1924,—to an office in the Grant Building. I presume they sent for me because my name was in that book. When I came down to the office in the Grant Building, Mr. Parker was there, and I don't know the other gentleman, I forgot the other man's name. It was not Mr. Oftedal. I can recognize the man in the rear there now. I believe it

(Testimony of George W. Marsh.)

was about the 1st of October. I was not again interviewed by any Government officer, and not until I came to take the stand here to-day. As close as I can remember, it was about October or November, 1923, that I first went to this place. I was there continually, that is off and on, until October 3, 1924, but not very much in the last seven or eight months. To my knowledge, I think I first saw the defendant Mahoney at the premises 1249 Polk Street about the end of 1923.

The COURT.—Was Mr. Mahoney there at the same time that Mr. Brand was?

A. I don't think so.

Q. At any time? A. I don't think so.

(R. Tr. Vol. 2, pp. 51–55, inc.)

TESTIMONY OF STEPHEN V. KEVENEY, FOR THE GOVERNMENT.

STEPHEN V. KEVENEY, a witness called for the United States, and sworn, testified as follows:

Direct Examination.

(By Mr. GILLIS.)

My position with the Government is a Federal [141] Prohibition Agent, and I have been one for six months, from about July, 1924.

Q. In June or July, 1923, did you ever have occasion to visit 1249 Polk Street?

Mr. O'CONNOR.—That is objected to on the ground it is immaterial, irrelevant and incompe-

(Testimony of Stephen V. Keveney.)

tent, and in no way connected with the conspiracy charged in this indictment.

The COURT.—I do not see your point.

Mr. SMITH.—There is no foundation laid for the introduction of this testimony, and we object upon the ground that none of the defendants upon trial here have been shown to have had any connection at the time designated by the Government's attorney.

The COURT.—The objection is overruled.

Mr. SMITH.—Note an exception.

A. I did.

Mr. GILLIS.—Q. Did you purchase any drinks in June, 1923, intoxicating liquor, in that place?

Mr. SMITH.—The same objection.

The COURT.—Same ruling.

Mr. SMITH.—Exception.

A. I did.

The WITNESS.—(Continuing.) I purchased drinks from George Hawkins. I purchased four drinks of whiskey and a bottle of whiskey. I visited the place on July 3, 1923. At that time I purchased intoxicating liquor from George Hawkins.

Mr. SMITH.—Objected to on the ground it has been asked and answered.

The COURT.—This is another occasion.

Mr. GILLIS.—Yes.

Mr. SMITH.—What was the date of the first?

Mr. GILLIS.—In June.

A. Whiskey was purchased on that [142] occasion.

(Testimony of Stephen V. Keveney.)

Cross-examination.

(By Mr. O'CONNOR.)

I became a Federal Prohibition Agent in July or August, 1924. Prior to this time I was not an undercover agent for the Government. At no time before July or August, 1924, was I connected with the Government. At the time that I made this purchase of liquor at those premises from George Hawkins in 1923, I was not employed by the United States Government either as an undercover agent or as a Federal Prohibition agent, or as an informer. At that time I was assistant cashier for the Merchants' Parcel Delivery. The two visits that I have testified to are the only visits that I ever made to this place. I didn't go there alone. I went there with some friends.

Mr. SMITH.—I will ask that the entire testimony be stricken out upon the ground it is immaterial, irrelevant and incompetent, and in no way connected with any of the defendants who are here on trial. For the Court's information, I desire to remind the Court that Mr. Hawkins has never been arrested, he has never been arraigned, and he is not before the Court. This testimony all relates to the conduct of the place at the time it is alleged Hawkins was in charge. Hawkins has never been connected with any of the defendants, and for that reason I ask that the entire testimony be stricken from the record.

The COURT.—Motion denied.

Mr. SMITH.—Exception.

(R. Tr. Vol. 2, pp. 55–58, inc.) [143]

TESTIMONY OF L. V. BYBEE, FOR THE GOVERNMENT.

L. V. BYBEE, a witness called for the United States, and sworn, testified as follows:

Direct Examination.

(By Mr. GILLIS.)

My position with the Government is that of a Federal Prohibition Agent, and I have been such since May, 1924. I visited 1249 Polk Street on September 27, 1924. I purchased six gingerale whiskey highballs there at that time. I have a description of the person from whom I purchased them. I didn't know his name at that time. I think I know his name now. I am not quite sure of it. My best recollection is that it was a man known as Eddy Marron.

Cross-examination.

(By Mr. GREEN.)

The description I have is a man five feet—about five feet seven and one-half—this is an approximate description, of course—about 35 to 38 years of age, about 140 to 150 pounds in weight; I believe that is something near it; I don't remember the exact number of pounds; perhaps it was 135 to 145; dark hair; I remember the person was a trim, dapper, well-dressed person. I didn't visit the premises with Agent Howard a few days before that. I do not know the defendant Walter Brand.

(Testimony of L. V. Bybee.)

(Thereupon Walter Brand, one of the defendants, at the request of his counsel, stood up.)

That is not the man that I saw on those premises. I only saw just the one person who served us the drinks that night. I only visited the premises once.

Cross-examination.

(By Mr. SMITH.)

I know Mr. Marron when I see him now. I picked him [144] out when I first saw him up here in the corridor. I had previously seen his picture. No one pointed him out up to that time. I asked someone if that was Mr. Marron. I don't recall the person that I asked; somebody in the corridor. I asked him yesterday. I don't remember who it was. I asked the question with the idea of making sure which one was Marron. He was one of the central figures in this case, and I was curious to know whether or not it was Marron. I don't remember who I asked. I asked who the other people were. I don't recall who they were. Some of the men I was talking to. I don't recall whether they were Prohibition Agents or Intelligence Units men, or who they were. I have been talking this matter over with the Intelligence Unit men and the Prohibition Agents as to the identity of the individuals I saw in the hall yesterday. I don't recall entirely who were the Intelligence men or who were the Prohibition Agents that I talked to. I think I recall Mr. Whittier and Mr. Lee and Mr. Gwynn. I can't recall whether there were any

(Testimony of L. V. Bybee.)

others I asked as to the identity of these men at the time or not. Those are the only three that I can remember. I don't recall which one of the three pointed out Marron. There was another man that resembled Mr. Marron, and I asked whether that was Ward Marron, as I thought there was a resemblance between the two men, and then there was a man whose picture I had seen in the paper, Mr. Birdsall, and I had previously seen Mr. Mahoney, so that I knew who he was. Then there was the gray-haired gentleman, I remember asking someone who he was; and I think all of the men in the case were pointed out to me, that were in a crowd; I think there were four or five men out there standing talking. No one pointed out any person as being Ward Marron. I asked the question of someone whether one of the men in the crowd was Ward Marron, because I had heard his name also. If Eddie Marron was the man who served [145] me the drinks at 1249 Polk Street on September 27, I did have a conversation with him. I am not absolutely certain that he was the man. It is not purely a guess, no. To the best of my recollection, Eddie Marron is the man who served us with the drinks there that night. I have a description of the man in my buy report. The description is in my note-book. I have the note-book with me and the buy report also. I looked at the buy report for the purpose of refreshing my memory. The description in the buy report was taken from my notes that I made at the time. It is "1249 Polk

(Testimony of L. V. Bybee.)

Street, upstairs, 6 times 50, $3; that is B. T., 5 feet 7½, 145 to 150, 35 dark hair, smooth shaven." I made those notes after returning to my room, which was a very short distance from 1249 Polk Street. I made them that night, the night of September 27th. "10–2–24" means the date when the warrant was issued. I believe it was the date that I secured the warrant. The description in the warrant was partially taken from these notes. When I completed my buy report I made more complete data on the case. An informer was with me that night,—that is, a companion who was not connected with the department, and he didn't know what I was doing. He didn't know that I was a Prohibition Agent. We were trying to get a buy on 1249 Polk Street. I took this party in as a companion, because going there alone would possibly create suspicion. I had never been there before. With the description before me, all of the facts are fairly clear in my mind. My mind is well refreshed on the most important points. I have stated to the best of my recollection that the individual I bought the liquor from is Eddie Marron. If I would be absolutely certain I would come out with an entirely positive statement on it. To the best of my recollection Eddie Marron was the man who served the drinks. Aside [146] from the assistance that I received from anyone else, I could independently pick out Marron as the one who served me the liquor. That is what I did when I came into the hall. He was not pointed out to me.

(Testimony of L. V. Bybee.)

I picked him out. I hadn't previously seen him any other time, to the best of my knowledge, except at 1249 Polk Street, and when I saw him yesterday; I saw pictures in the paper. I have not seen him that I know of in the *interim*. I have not seen him since the night of September 27, 1924. I had read over my description, of course, and was on the lookout for the man who sold me the drinks. There was no doubt in my mind as to whether it was Eddie Marron or Ward Marron when I saw him yesterday. I am not positive that I know Ward Marron, no. I was interested in Ward Marron because of the statement made that he was trying to kill another gentleman who was with me in there. I was in the party. I was interested because of that. There was another man with him whose facial resemblance was very much the same as Eddie Marron's, and I judged they were brothers, because there was that resemblance. There is a possibility that it could well have been somebody else other than this man here that served me drinks, but I feel certain in my mind that he is the man that served the drinks.

(R. Tr. Vol. 2, pp. 58–67.)

TESTIMONY OF JOSEPH S. CAMPLONG, FOR THE GOVERNMENT.

JOSEPH S. CAMPLONG, a witness called for the United States, and sworn, testified as follows:

Direct Examination.

(By Mr. GILLIS.)

My position with the Government is a Federal Prohibition Agent, and has been such for about a year. I was present at 1249 Polk Street on February 26, 1924. I purchased intoxicating [147] liquor there at that time,—two drinks of Scotch whiskey. I know the man I purchased it from. He gave his name as Eddie Marron. He is one of the defendants in this case.

Cross-examination.

(By Mr. SMITH.)

I didn't make any notes of the incidents that occurred on the evening of that visit other than my regular buy report. I didn't keep a separate little diary at that time; I was working under cover. The man happened to give his name to me at that time because I went there to make a deal for ten cases of liquor, and I was introduced to him, and after talking he told me his name was Eddie Marron. I had never seen him before that time. I have seen him since, on March 1, 1924. At that time I saw him at the place, 1249 Polk Street. I have not seen him since then. I didn't buy the ten cases of liquor from him. I went there for that

(Testimony of Joseph S. Camplong.)

purpose. There were several men there in the place besides Eddie Marron that I didn't know. Agent Parker was with me on the first visit. That is the man that was quite active in Los Angeles; he was from the Los Angeles office. He is no longer connected with the Department.

Q. Do you know where he is now?

Mr. GILLIS.—I think that is immaterial, and I object to that on that ground, and irrelevant.

The COURT.—Objection sustained.

The WITNESS.—(Continuing.) I didn't make any notes of the incidents that evening other than the case report that I made out.

Mr. SMITH.—Q. Was there ever any prosecution based, if you know, upon the purchase made by you at that time?

Mr. GILLIS.—The record is the best evidence of that, and I object to it on that ground.

Mr. SMITH.—I am asking if he knows. [148]

The COURT.—It does not make any difference if he knows or not. The record is the best evidence. Sustained.

Mr. SMITH.—Q. Did you ever go to a United States Commissioner for the purpose of securing a search-warrant based upon that purchase?

Mr. GILLIS.—I think it is entirely immaterial and irrelevant.

The COURT.—Sustained.

Mr. SMITH.—I take an exception to the sustaining of both objections.

(Testimony of Joseph S. Camplong.)

The WITNESS.—(Continuing.) The reason that I did not purchase the 10 cases of liquor that I went there to buy was because I could not get the funds at the time to buy that much liquor. I was in the Government service. I could not get the money from the Government.

The COURT.—Did he agree to sell you that liquor?

A. Yes, sir, he agreed to sell it, but I could not get the funds from the office.

The WITNESS.—(Continuing, to Mr. Smith.) I could not get the funds to buy it.

Redirect Examination.

(By Mr. GILLIS.)

I was there on March 1, 1924. I purchased some liquor there then from Eddie Marron. There were four drinks at fifty cents each of Scotch whiskey.

Recross-examination.

(By Mr. SMITH.)

I only made a mental description of Eddie Marron at the time, other than I know him when I see him, though.

(R. Tr. Vol. 2, pp. 67–70, inc.) [149]

TESTIMONY OF CHESTER A. HOWARD, FOR THE GOVERNMENT (RECALLED—CROSS-EXAMINATION).

Cross-examination.

(By Mr. GREEN.)

Yesterday I testified that on the 22d day of September, 1924, I purchased fifteen drinks of whiskey

(Testimony of Chester A. Howard.)

at the premises from the defendant Walter Brand. There were four other people there at the time whom I met in another bootlegging establishment on Bush Street. There were no other Federal Agents with me.

(R. Tr. Vol. 2, pp. 70–71.)

TESTIMONY OF GEORGE H. NEARY, FOR THE GOVERNMENT.

GEORGE H. NEARY, a witness called for the United States, and sworn, testified as follows:

Direct Examination.

(By Mr. GILLIS.)

I am in the used car business. I was connected with the Government as a Prohibition Agent for about 2½ years. I was a Prohibition Agent on May 15, 1924. On that date I had occasion to visit 1249 Polk Street. I went there with a search-warrant, and found 44 quarts of wine, two gallons of gin, one gallon jug half full of whiskey, three sacks—

Mr. SMITH.—What was the date?

Mr. GILLIS.—May 15, 1924.

Mr. SMITH.—May it please the Court, at this time we are going to ask that the testimony heretofore given by the agent be stricken out for the purpose of renewing the motion that I have heretofore made.

The COURT.—I will not strike it out until I have heard your reason. What are the grounds for it? [150]

Mr. SMITH.—May it please the Court, on the 15th day of May, the records of this Court show that certain violations of the National Prohibition Act took place at 1249 Polk Street; thereafter an information was filed, that is, subsequent to the 15th day of May, in this Court, the action being numbered 15018. In that information George Birdsall was charged with violating the National Prohibition Act. On the 23d of May, the defendant, George Birdsall, came into this courtroom and entered a plea of guilty to that charge. The Court imposed judgment, and that judgment was fully satisfied. Heretofore I have entered a plea in bar to any evidence that might be elicited at this trial, and I renew the motion now upon the ground that the defendant Birdsall has been once in jeopardy, he has answered to the Government for any infraction of the law that he might have been guilty of, and he has satisfied the judgment imposed upon him by the Court; and I submit that evidence of that sort cannot be used against him in any other prosecution, and for that reason I ask that the entire testimony of Agent Neary, or Mr. Neary, formerly Prohibition Agent, be stricken from the record.

The COURT.—Of course, Mr. Smith, in the first place, the defendant Birdsall is not charged with the offense there; the jury, of course, will be instructed that they could not find him guilty upon the charge of either possessing or selling liquor or maintaining a nuisance; that, in the first place; in the sec-

(Testimony of George H. Neary.)

ond place, of course, it is well recognized that where a conspiracy is charged for a series of crimes, the mere fact that one man may have been punished for one of the overt acts is no bar to the charge of conspiracy; in the third place, even if that were so, it would not affect the evidence as to the other defendants. The motion is denied.

Mr. SMITH.—As to all the defendants? [151]

The COURT.—Yes.

Mr. SMITH.—Note an exception.

Mr. O'CONNOR.—An exception as to the defendant Mahoney.

Mr. GILLIS.—Proceed with your answer.

A. And 3 sacks containing 24 pints of beer, 12 quarts of whiskey, 10 quarts of gin, 10 gallons of alcohol, and 3 quarts of champagne.

The WITNESS.—(Continuing to Mr. Gillis.) I arrested a man that night by the name of George Howard. He is the defendant Birdsall.

Cross-examination.

(By Mr. SMITH.)

I don't remember that subsequent to that arrest I appeared in the District Court and testified to the facts that I have testified to here now. I can't recall that. I don't believe I have. I have no recollection of it.

Mr. SMITH.—Q. Mr. Neary, here is record No. 15018—it is stipulated that this is an information filed in this court, and the number is 15018?

Mr. GILLIS.—Yes.

(Testimony of George H. Neary.)

Mr. SMITH.—Q. Mr. Neary, I show you this information, and attached to the information is an affidavit bearing the signature George Neary: Is that your signature? A. Yes.

Q. I ask you, Mr. Neary, if that affidavit was signed by you for the purpose of having an information filed in this court?

Mr. GILLIS.—Just a moment. To which I object as being incompetent, and irrelevant, that the affidavit speaks for itself, the record speaks for itself.

The COURT.—Is it for the purpose of impeachment?

Mr. SMITH.—No, it is not.

The COURT.—Is it for the purpose of making your point?

Mr. SMITH.—Yes.

The COURT.—You do not have to ask him anything about it. All you have to do is to offer the record. If your point is good, [152] the Court of Appeals will so hold.

Mr. SMITH.—Then at this time I will offer in evidence an information filed, No. 15018, in which the United States of America is plaintiff, and George Howard, the defendant; that record shows that on the 15th of May, 1924, at 1249 Polk Street—

The COURT.—Never mind what it says. Is there any objection to it?

Mr. GILLIS.—No objection to the record.

The COURT.—All right.

Mr. SMITH.—We will offer it.

The COURT.—Now, you may state what it shows, if you want to.

Mr. SMITH.—This is offered, may it please the Court, to show that the matters testified to by Mr. Neary have already been disposed of by this court, by this information, and I will ask that the entire testimony of Mr. Neary be stricken out upon the ground that the defendant has already been prosecuted and punished for the offenses, if any, he committed at that time.

The COURT.—Motion denied.

Mr. SMITH.—Exception.

Mr. GILLIS.—Just one thing, I ask that the record be corrected on, and that is, Mr. Smith made the statement that it shows that what Mr. Neary has testified to has already been disposed of by this Court, which is not the fact.

The COURT.—Of course, the jury will be properly instructed on that, Mr. Gillis. The fact that a man has been punished for one of the overt acts in a series of crimes, of course, is not a defense to a conspiracy, to commit those crimes generally. The jury will be so instructed.

Mr. SMITH.—So that the record may be complete, I will ask that the entire record of that case be admitted.

The COURT.—It will be admitted. [153]

(Thereupon the record of the United States District Court in action No. 15,018 was introduced in evidence as Defendants' Exhibit ——.)

The said exhibit was and is in the following words and figures:

(Here insert exhibit.)

(Thereupon the record of action No. 15,018 was admitted in evidence. Said record shows that George Howard, referred to and known as George Birdsall, *alias* George Howard, in this case, on May 20, 1924, pleaded guilty to an information charging a violation of the National Prohibition Act, and that on May 20, 1924, he was fined the sum of $500, which said fine was paid on June 2, 1924.)

TESTIMONY OF G. L. LEE, FOR THE GOVERNMENT.

G. L. LEE, a witness called for the United States, and sworn, testified as follows:

Direct Examination.

(By Mr. GILLIS.)

I am a Federal Prohibition Agent, and have been since February, last year. I was present at 1249 Polk Street on October 2, 1924. I went there with other agents with a search-warrant. We had a driver by the name of Camona. He rang three bells. That was supposed to be the way of entering, and the door was opened and we walked right in. When we went in I went right up the stairs and went directly to the kitchen—what used to be a kitchen. I saw liquor in the kitchen. We started to search and there was liquor in the ice-chest and in the kitchen closet there was wine and whiskey,

(Testimony of G. L. Lee.)

and in the ice-chest there was Canadian Rainier Beer—principally beer in the ice-chest.

Q. Did you see any other evidence of liquor there or anything that is used in connection with liquor?

A. Well, in the kitchen—

Mr. SMITH.—Just a moment. That is objected to on the ground that it is calling for the opinion and conclusion of the witness. [154]

The COURT.—It is overruled.

Mr. SMITH.—Note an exception.

The WITNESS.—(Continuing.) There was no stove in the kitchen, there was a cash register, a slot machine standing alongside of the cash register, and a table in the center of the kitchen; the next room was a serving-room next to the kitchen, which was a dining-room, a table in there, and chairs, and a slot machine also in that. On the back porch there were not any stairs from the back porch down into the yard, but it was full of bottles, thousands of empty bottles, beer bottles and whiskey bottles.

Q. Did you see any evidence there of anyone living in that place?

Mr. SMITH.—Just a second. That is calling for the opinion and conclusion of the witness.

The COURT.—Overruled.

Mr. SMITH.—Note an exception.

The WITNESS.—(Continuing.) No. I believe I was in all of the rooms. There were no signs of any beds. I believe there was a davenport in the front room, in the front room to the south. I saw

(Testimony of G. L. Lee.)

no bed. I didn't see any dishes or any evidence of cooking. There was no dishes in the kitchen closet. There was just liquor and cigarettes and stuff like that.

Q. Did you see slot machines in any of the rooms?

Mr. SMITH.—That is objected to on the ground it is immaterial, irrelevant and incompetent, and has no bearing on the issues involved in this case.

The COURT.—Overruled.

Mr. SMITH.—Note an exception.

The WITNESS.—(Continuing.) The slot machines that I noticed particularly were in the two back rooms; the other front rooms, I was in them very little. I just took one walk up the front. [155]

Mr. GILLIS.—Were you present at that time on October 3, 1924?

Mr. SMITH.—Just a second: At this time, may it please the Court, there has been an order suppressing evidence obtained at that time, on the defendant's person.

The COURT.—That is evidence seized on October 3d?

Mr. SMITH.—Yes.

Mr. GILLIS.—There has been an order suppressing the evidence as to the defendant Birdsall alone.

Mr. O'CONNOR.—At this time, if your Honor please, on behalf of the defendant Mahoney, all of this evidence is objected to on the ground that on October 2d a raid was made, and on October 3d an-

(Testimony of G. L. Lee.)

other raid was made on a search-warrant, the buy of which had been made prior to the raid of October 2d, and we object to this evidence on the ground that there was no proper ground for the issuance of the search-warrant.

The COURT.—Overruled.

Mr. O'CONNOR.—Exception.

Mr. SMITH.—May the same objection go for the defendants I represent.

The COURT.—Yes.

Mr. SMITH.—Exception.

Mr. GILLIS.—Answer the question.

A. Yes, I was present on the raid of October 3d. I assisted in searching the premises on October 3d. We found liquor but not as much as on the first raid. I have a list of it here. Two bottles of port wine, one bottle of port wine three-quarters full, one bottle of whiskey, one bottle one-third full of whiskey, one bottle containing two ounces of whiskey, one bottle three-quarters full of brandy, one bottle half full of Scotch whiskey, one bottle one-third full of Vermuth, two bottles of gin, one one-gallon bottle three-quarters full of gin, one bottle of [156] Bocarde rum, one bottle of Bocarde rum nearly full, two sacks of Canadian beer.

The COURT.—Had you cleaned out the place on the 2d of October? A. Yes, sir.

Q. You found this liquor on the 3d?

A. We found this the next day.

The WITNESS.—(Continuing to Mr. Gillis.) We arrested a defendant by the name of Charles

(Testimony of G. L. Lee.)

Clark, who afterwards proved to be Mahoney. He is the defendant in this case. He gave the name of Charles Clark at the time of his arrest.

Cross-examination.

(By Mr. O'CONNOR.)

After I arrested the defendant he gave the name of Charles Clark. I spoke to him at the Bush Street Police Station, and I left him at that place. I booked him there under the charge of violating the National Prohibition Act.

Cross-examination.

(By Mr. GREEN.)

I arrested George Birdsall on the raid of October 2d.

Mr. SMITH.—Just a second before Mr. Lee leaves the stand. May it please the Court, at this time I move that the entire testimony be stricken out and the jury instructed to disregard it upon these grounds: As I understand the situation, the reason behind the exclusion and suppression of this evidence on behalf of the defendant Birdsall is that there was no proper ground for the issuance of the warrant, inasmuch as the violation set forth, or the alleged violation set forth in the affidavit had occured prior to the time of the first raid. Now, it has been urged that only the person, the owner of the property seized, could complain, and I submit that if there was no ground for [157] the issuance of the warrant and the seizure was unlawful thereby,

(Testimony of Stephen V. Keveney.)

the evidence would not be admissible as against any, because the evidence was unlawfully obtained.

The COURT.—Such, of course, is not the rule.

Mr. SMITH.—It is the rule, as I understand it.

The COURT.—The motion is denied.

Mr. SMITH.—Note an exception.

The COURT.—I am obliged to take an adjournment until a little later to-day, so we will take our adjournment until 2:15.

Mr. SMITH.—Before adjourning I would like to have the jury instructed at this time that all of the evidence must be disregarded as concerned the defendant Birdsall.

The COURT.—The testimony in regard to the raid of October 3d will be disregarded so far as Birdsall is concerned. That does not apply to the raid of October 2, but only October 3d. It may be considered by you, however, as to the other defendants.

(R. Tr. Vol. 2, pp. 76–81, inc.)

TESTIMONY OF STEPHEN V. KEVENEY, FOR THE GOVERNMENT (RECALLED FOR FURTHER CROSS-EXAMINATION).

(By Mr. O'CONNOR.)

I did testify before the Federal Grand Jury in this matter. At that time I did not sign any waiver of immunity from prosecution.

(R. Tr. Vol. 2, p. 82.)

TESTIMONY OF W. F. WHITTIER, FOR THE GOVERNMENT (RECALLED FOR DIRECT EXAMINATION).

(By Mr. GILLIS.)

I was present at 1249 Polk Street on October 3, 1924.

Q. Did you make a search of the premises there at that time? [158]

Mr. SMITH.—At this time I will object to any testimony that might be given with reference to what occurred at 1249 Polk Street on October 3, for the reason that the entry into the premises was made by reason of a warrant that never should have been issued. The grounds as stated in the warrant show an alleged violation, that is, the affidavit upon which the search-warrant was issued shows an alleged violation that took place on the 27th of September at that place, and thereafter, on [159] October 2d, a warrant was issued to search the place, and that warrant was executed on the 3d; that no violation had occured on the premises, so far as the record discloses, since the place was raided on October 2d, and therefore there were no grounds that would justify the issuance of the warrant. I make the objection on behalf of the defendant Marron, the evidence having been already excluded and suppressed as to the defendant Birdsall.

The COURT.—The objection is overruled.

Mr. SMITH.—Exception.

(Testimony of W. F. Whittier.)

Mr. O'CONNOR.—May that also go to the defendant Mahoney and an exception noted?

The COURT.—Yes.

A. We did.

The WITNESS.—(Continuing.) At that time I found two bottles of port wine, one bottle of port wine three-quarters full, one bottle of whiskey, one bottle one-third full of whiskey, one bottle containing two ounces of whiskey, a bottle three-quarters full of brandy, one bottle one-half full of Scotch whiskey, one bottle one-third full of Vermuth, two bottles of gin, one one-gallon bottle three-quarters full of gin, one bottle of Bocardi rum, one bottle Bocardi rum nearly full, two sacks of Canadian beer. (A bottle numbered 27999, marked "United States Exhibit 9 for Identification" was here shown to witness.) This bottle was secured by me at that time and at that place, and was delivered to the United States Chemist. (A bottle numbered 28000, marked "United States Exhibit 10 for Identification" was here shown to witness.) I secured this bottle at that time and place and it was delivered to the United States Chemist. (A bottle numbered 28001, marked "United States Exhibit 11 for Identtification" was here shown to witness.) This bottle was secured at that time and place, and was delivered to the United States Chemist. (A bottle numbered 28002, marked "United States Exhibit [160] 12 for Identification" was here shown to witness.) I secured this bottle at that time and place, and I delivered

(Testimony of W. F. Whittier.)

it to the United States Chemist. (A bottle numbered 28003, marked "United States Exhibit 13 for Identification" was here shown to witness.) I secured this bottle at that time and place, and delivered it to the United States Chemist. (A bottle numbered 28004, marked "United States Exhibit 14 for Identification" was here shown to witness.) I secured this bottle at that time and place, and I delivered it to the United States Chemist.

Q. What part of the flat did you particularly search? A. I was all through the flat.

Q. Did you see any slot machines?

Mr. SMITH.—Just a second; we will object to that on the ground that it is immaterial, irrelevant and incompetant, has nothing to do with the charge laid in the indictment.

The COURT.—I don't know that it has, Mr. Gillis.

Mr. GILLIS.—It shows, if nothing else, the character of the place.

The COURT.—I think you have sufficiently established that it was not a residence, and that is all that is necessary.

Mr. GILLIS.—The contention of the Government is, of course, that this was run as a bootlegging place, where they were regularly dispensing liquors. I want to show the furniture there.

Mr. SMITH.—We object to the remark of counsel for the Government, because I do not think that is a proper remark at this time to be addressed to the Court in the presence of the jury.

(Testimony of W. F. Whittier.)

The COURT.—I cannot see any objection to it.

Mr. SMITH.—We note an exception.

The COURT.—He is stating the contention of the Government.

Mr. GILLIS.—I want to show what furniture and different things were in there. [161]

The COURT.—I will let it in. I do not see that it is of much importance.

Mr. SMITH.—Note an exception.

Mr. GILLIS.—Answer the question. A. I did.

The WITNESS.—(Continuing.) There was a slot machine in the kitchen alongside of the cash register, and in the room adjoining, or alongside the kitchen, was one, and in each one of the front rooms there was one, four altogether that I remember. I arrested a man who gave his name as Charles Clark on that evening, who afterwards we found out was named Mahoney, one of the defendants in this case.

Q. I show you a slip of paper, and ask you to examine that, without making any comment on it. Do you recognize that, Mr. Whittier? A. Yes.

Q. Where did you secure that? Where did you get that?

A. In one of the rooms at 1249 Polk Street.

Q. On October 3d? A. Yes.

Mr. GILLIS.—I now ask that this be introduced in evidence and marked a Government exhibit.

Mr. SMITH.—To which we object on the ground that it demonstrates nothing. If the purpose of the Government is to show that it is a record of something, I submit that it is not the best evidence.

Furthermore, it is not covered by the warrant. The contention of the defendants Birdsall and Marron is that if this was seized it was seized in excess of the powers given to the agents under the warrant; it is not described in the warrant, and it is not authorized by the search-warrant.

The COURT.—I assume, Mr. Gillis, that it would have to be identified by the proper official as being what it purports to be. I doubt very much if a thing of this kind would speak for itself. [162]

Mr. GILLIS.—Would not that go to the weight of the instrument, or to the weight of the evidence?

The COURT.—I do not think so. I think it goes to the identification of the piece of paper. I think you had better bring a proper official here and have him identify that. You may mark it for identification.

Mr. O'CONNOR.—We object to it on behalf of the defendant Mahoney on the ground that no foundation has been laid for its introduction, even for identification.

The COURT.—Objection sustained. You may mark it for identification.

Mr. GILLIS.—The objection that Mr. O'Connor made was to its being introduced for the purpose of identification.

Mr. O'CONNOR.—I will withdraw that objection. I thought you offered it in evidence.

The COURT.—Mr. Smith, have you any doubt that is what it purports to be?

Mr. SMITH.—Yes, I have. My information is

(Testimony of W. F. Whittier.)

that the condition is contrary to what is shown by the paper.

(A document is here shown to the witness and is marked "United States Exhibit 14 for Identification.")

Said exhibit was and is in the following words and figures:

(Here insert exhibit.)

Mr. GILLIS.—Q. I show you another piece of paper, Mr. Whittier, and ask you to examine that without comment.

Mr. O'CONNOR.—The same objection as to the defendant Mahoney.

Mr. GILLIS.—Q. Do you recognize that, Mr. Whittier? A. I do.

Q. Where did you get that?

A. The same room. [163]

Q. You mean by that at 1249 Polk Street?

A. 1249 Polk Street.

Q. On October 3d? A. On October 3d.

Mr. GILLIS.—I ask that that be introduced for the purpose of identification.

(A document is here shown to the witness and marked "United States Exhibit 15 for Identification.")

Said exhibit was and is in the following words and figures:

(Here insert exhibit.)

Mr. GILLIS.—Q. I believe you have testified, Mr. Whittier, that you were there on October 2d, also? A. I did.

(Testimony of W. F. Whittier.)

Q. I show you another sheet of paper and ask you if you recognize that, without any comment? Just look at it first without answering the question. Do you recognize that sheet of paper, Mr. Whittier?

A. I do.

Q. Where did you find that?

A. In the gray book.

Q. That was seized on October 2d?

A. On October 2d.

Q. At 1249 Polk Street? A. Yes.

Q. You say it was in the gray book?

A. Yes, laying loose.

(A document was here shown to the witness, and was thereupon introduced in evidence as United States Exhibit 16 for Identification.)

Mr. O'CONNOR.—Objected to on behalf of the defendant Mahoney as irrelevant, immaterial and incompetent and no foundation laid for its introduction in evidence.

Mr. SMITH.—As far as the defendants Marron and Birdsall are concerned, we will object to its introduction upon the ground that no foundation has been laid, that there is no [164] identification of the particular instrument, that there is nothing to show that what appears on it is authentic, or that it represents any particular thing in connection with this particular case, and, in addition thereto, it is not one of the things that was authorized to be seized by virtue of the search-warrant that was issued on that date, and was seized in excess of authority.

(Testimony of W. F. Whittier.)

The COURT.—Overruled.

Mr. SMITH.—Exception.

(The document was thereupon introduced in evidence and marked "United States Exhibit 16.")

Said exhibit was and is in the following words and figures, to wit:

(Here insert exhibit.)

Mr. O'CONNOR.—An exception also for the defendant Mahoney.

Mr. GILLIS.—I show you five small slips of paper and ask you to look at them without comment.

Mr. SMITH.—We will offer the same objection that has been offered heretofore with reference to other papers and records that have been seized there.

Mr. GILLIS.—Q. Do you recognize these, Mr. Whittier? A. I do.

Q. Where did you get these?

A. Out of the book.

Q. When you refer to the book, you mean the gray book, Government's Exhibit 3?

A. That is it.

Q. And they were in this book when you first saw them? A. Yes.

Mr. SMITH.—May it please the Court, as I have stated, I do not want to clutter up the record with a lot of unnecessary objections, but it looks as though Mr. Gillis is testifying instead of the witness. I will object to the question on the ground that it is leading and suggestive, both.

(Testimony of W. F. Whittier.)

The COURT.—The objection is overruled. [165]

Mr. SMITH.—Note an exception.

(The documents were here introduced in evidence as "United States Exhibit 17.")

Said exhibit was and is in the following words and figures, to wit:

(Here insert exhibit.)

Mr. GILLIS.—Q. When you have referred to the gray book in your previous testimony, Mr. Whittier, you refer to this book that I have now in my hand, Government's Exhibit 3? A. Yes.

Mr. SMITH.—We object to their introduction in evidence on the grounds heretofore urged on behalf of the defendants Marron and Birdsall.

The COURT.—The same ruling.

Mr. SMITH.—Exception.

Cross-examination.

(By Mr. O'CONNOR.)

The man that I arrested gave the name of Charles Clark. After I put him under arrest I first let him ring up Mr. Smith, and then took him to the Bush Street Police Station and booked him for violation of the National Prohibition Act, I believe. I left the defendant there. I took the liquor to the evidence box. It was about 5:15 that day that I seized the liquor. We stored the liquor that night at the evidence box in the Appraisers Building. I believe it was turned over to the chemist the next morning by one of the agents. I am not

(Testimony of W. F. Whittier.)

sure that I did not turn it over. I would not state that.

Cross-examination.

(By Mr. SMITH.)

I am Agent Whittier who executed the search-warrant on October 2, 1924, at those premises, and I am the agent who executed the search-warrant at those premises on October 3. [166]

Mr. SMITH.—Mr. Whittier, I hand you a paper and will ask you if that is a copy of the search-warrant that you left at 1249 Polk Street on October 3? A. Yes.

The WITNESS.—(Continuing.) In addition to the articles enumerated on the reverse side, I seized some papers. I did not enumerate those papers.

Mr. GILLIS.—I think the record on the back of the search-warrant is the best evidence.

The COURT.—It speaks for itself. Objection sustained.

Mr. SMITH.—Q. Was there any reason why you did not enumerate the papers?

Mr. GILLIS.—I think that is objectionable, immaterial and irrelevant.

The COURT.—Objection sustained.

Mr. SMITH.—At this time I would like to offer this warrant in evidence, and ask that it be given the appropriate number of the defendants Birdsall and Marron.

Mr. O'CONNOR.—May it be understood as being offered as to the defendant Mahoney also?

The COURT.—Yes.

(Testimony of W. F. Whittier.)

(Thereupon the document was introduced in evidence and marked Defendants' Exhibit "B.")

Said exhibit was and is in the following words and figures:

(Here insert exhibit.)

Mr. SMITH.—Q. You did not list any papers that you seized on October 2d as having been seized at that address, did you, on the search-warrant?

A. No.

Q. Your search-warrant did not call for those papers, did it?

Mr. GILLIS.—The search-warrant is the best evidence of what [167] is on there, and I object on that ground.

The COURT.—Objection sustained.

Mr. SMITH.—That is all. At this time I will ask, may it please the Court, that the jury be instructed to disregard all of the testimony given by Agent Whittier as to what occurred at these premises on October 3d, as to the defendant Birdsall.

The COURT.—The motion is denied.

Mr. SMITH.—The motion is denied as to the defendant Birdsall? There has been an order suppressing the evidence.

The COURT.—Yes, the motion is granted.

(R. Tr. Vol. 2, pp. 82–92, inc.)

TESTIMONY OF ROBERT A. COULTER, FOR THE GOVERNMENT.

ROBERT A. COULTER, a witness called for the United States, and sworn, testified as follows:

Direct Examination.

(By Mr. GILLIS.)

My occupation is a Captain of Police, San Francisco Police Department, assigned to duty at the Western Addition Station. On the 26th of August, 1924, I communicated with the Prohibition Department of this city.

Q. What caused you to communicate with them?

Mr. SMITH.—We will object to that on the ground that it is immaterial, irrelevant and incompetent.

The COURT.—Overruled.

Mr. SMITH.—Note an exception.

The WITNESS.—(Continuing.) At about 10 A. M. on August 26, 1924, Police Officer Hicks, a member of my command, telephoned to me at the Western Addition Station. I received a report from [168] one of my officers, and thereafter I communicated with the Prohibition Department, calling Mr. Paget. Thereafter I went to 3047 Sacramento Street.

Q. Sacramento or California? A. California.

The WITNESS.—(Continuing.) The premises were occupied by one William F. Curran.

Q. What did you find or see when you arrived there?

(Testimony of Robert A. Coulter.)

Mr. O'CONNOR.—I move that this testimony be stricken out as to the defendant Mahoney on the ground it is immaterial, irrelevant and incompetent, in no way connected with the conspiracy charged, and not binding on him.

The COURT.—This is merely preliminary.

Mr. O'CONNOR.—I appreciate that.

The COURT.—There is nothing here so far that affects us, but I cannot anticipate that. The motion will be denied.

Mr. O'CONNOR.—Exception.

The COURT.—You may answer.

The WITNESS.—(Continuing.) I found a large quantity of liquor contained in the garage underneath his residence.

Mr. O'CONNOR.—I renew my objection.

Mr. GILLIS.—Have you a list of the liquor that you seized?

The COURT.—The objection will be overruled. I assume that this will be connected in some way with the defendants.

Mr. GILLIS.—I tell the Court at this time that I will connect this up with the defendants in this action.

The COURT.—The motion is denied.

Mr. O'CONNOR.—Exception.

The WITNESS.—(Continuing.) In the garage at this time there were 398 sacks containing what we presumed to be beer, 21 sacks presumed to contain whiskey, 7 sacks of whiskey partly filled, 11 cases of whiskey, three cases of champagne, three cases of

(Testimony of Robert A. Coulter.)

[169] champagne partly filled, two barrels of wine, one barrel of wine part full.

Mr. SMITH.—I am going to object to the testimony upon the ground that it has been shown that the premises were entered lawfully, or that the officers were lawful in the premises.

The COURT.—It doesn't make any difference. It was seized by the State officers.

Mr. SMITH.—He has not testified he seized it.

The COURT.—The entry was made by State officers. Go ahead, the objection is overruled.

Mr. SMITH.—Note an *objection.*

The WITNESS.—Shall I continue with the description of the property taken?

Mr. GILLIS.—Yes.

The WITNESS.—(Continuing.) Two barrels of brandy, two part full barrels of brandy, one 50-gallon tank of alcohol, one 5-gallon jug of wine part full, two 20-gallon stills, and an empty barrel.

Q. Did you seize the liquor at that time?

A. No, we entered the premises for the purpose of making a sanitary inspection. When we found that the liquor was contained therein we called the Federal Prohibition Agents, who were on the outside of the building, to enter, Federal Agents Shurtleff and William F. Gwynn. The owner of the property was William Curran. He admitted us into the alleyway, for the purpose of making a sanitary inspection.

Q. Now, I will ask you, Captain Coulter, if on September 2, 1924, you had occasion to communicate

(Testimony of Robert A. Coulter.)

with the Prohibition Department of this city, National Prohibition forces? A. On what date?

Q. On September 2d? A. No, I did not. [170]

Q. What date did you on or about that time?

A. September 3d.

Q. On September 3d? A. Yes, 1924.

The WITNESS.—(Continuing.) On September 2, about 7:20 P. M., I was attending a meeting of the Board of Police Commissioners at the Hall of Justice, when I was communicated with by one of the officers of my company, who informed me that he had been informed by—

Mr. SMITH.—We will object to that.

Mr. GILLIS.—Q. Without stating what the information was, you received certain information from one of the officers of your company?

A. Yes.

Q. Did you issue any orders upon that report from your officer? A. I did.

Q. What were those orders?

Mr. O'CONNOR.—I object to that on the ground it is hearsay and not binding upon any of these defendants.

The COURT.—You can state it generally. Objection overruled.

Mr. O'CONNOR.—Exception.

Mr. GILLIS.—Q. You were acting in your official capacity as a Captain of Police in charge of that district at that time?

Mr. O'CONNOR.—That is objected to on the ground that it is leading and suggestive.

(Testimony of Robert A. Coulter.)

The COURT.—Overruled.

Mr. O'CONNOR.—Exception.

A. I was.

Mr. GILLIS.—Q. Now, I will ask you what orders were issued by you?

Mr. SMITH.—That is objected to on the ground that it is immaterial, irrelevant and incompetent, and whatever orders were issued are not binding on any of these defendants, hearsay as to them. [171]

The COURT.—Overruled.

Mr. SMITH.—Exception.

The WITNESS.—(Continuing.) I communicated with the Platoon Commander at the Western Addition Station, and ordered him to blockade these premises and to permit nothing to be taken in or out of the same until the following morning.

Mr. GILLIS.—Q. What premises were those?

A. 2922 Sacramento Street.

The COURT.—This was a different place from the one you spoke of before?

A. Yes.

Mr. GILLIS.—Q. Now, on September 3d did you communicate with the Prohibition Department of this city?

A. Yes, I notified Federal Agent Rinckel.

Q. Did you go to 2922 Sacramento Street?

A. No, I did not.

Mr. GILLIS.—That is all.

Cross-examination.

(By Mr. SMITH.)

Q. Captain, you stated on direct examination that

(Testimony of Robert A. Coulter.)

you entered the premises at 3047 Sacramento Street for the purpose of making a sanitary inspection. Is that correct?

A. No. 3047 California Street.

Mr. SMITH.—Q. 3047 California Street, for the purpose of making a sanitary inspection. Is that correct? A. Yes.

Q. Had you received word that the place was in an unsanitary condition, that anything was wrong with the plumbing, or that a sanitary inspection was advisable?

Mr. GILLIS.—Objected to on the ground it is immaterial and irrelevant.

The COURT.—I will allow it. [172]

A. No, I did not.

Mr. SMITH.—Q. Is it not a fact, Captain Coulter, that the sanitary inspection was only a subterfuge to gain entrance to the premises?

A. That is all.

Q. Now, is it not a fact that you did not enter the premises proper, but you only went into the runway and peered into the basement of the building?

Mr. GILLIS.—That is asking for a conclusion.

The COURT.—You say he did not enter the premises properly?

Mr. SMITH.—He did not enter the premises themselves proper, he was on the outside of the premises; you understand.

Mr. GILLIS.—It calls for the conclusion of the witness. Let him state the facts.

The COURT.—I think that is what he is asking

(Testimony of Robert A. Coulter.)

for. He is asking what part he went into. I thought you said "properly."

A. We did enter the garage.

Mr. SMITH.—Q. You entered the garage. How did you first enter the premises, Captain?

A. The runway or the garage proper?

Q. When you first went to the premises, what happened when you first went to the door?

A. We went to the front door and rang the bell, and the owner of the premises asked for what purpose we were there, and we told him.

Q. What did you tell him?

A. We wanted to make a sanitary inspection of his premises, and investigate what was in his garage.

Q. What did you do after you entered the premises?

A. We entered the runway, and through a hole which had been knocked in the side of the basement proper, we entered the garage, where these liquors were contained. [173]

Q. You did not seize any liquors, did you, Captain? A. No.

Q. Your men did not seize any liquor, did they?

A. None whatever.

Q. The only property that was seized there was seized by the Prohibition Officers?

A. That is all.

Q. Whom did you talk to when you called up the Prohibition Department? A. Paget.

(Testimony of Robert A. Coulter.)

The WITNESS.—(Continuing.) I had a conversation with Mr. Paget and advised him of the phone call I received from the officer on the beat, to the effect that the officer had witnessed what he presumed to be a truckload of liquor being taken away from this address, and that the odor of liquor was very noticeable coming from this basement.

Mr. O'CONNOR.—That is objected to on behalf of the defendant Mahoney, on the ground that it is hearsay.

Mr. GILLIS.—They asked for it.

The COURT.—I suppose one defendant can object to what another puts in. I will overrule the objection.

Mr. O'CONNOR.—Exception.

The WITNESS.—(Continuing.) Paget asked me if we knew there was liquor on the premises, and I advised him that was the information we received from Officer Hicks.

Q. Purely information up to this time. You had no knowledge. A. None whatever.

Q. Mr. Paget gave you some instructions, did he not? A. Oh, no.

Q. Did he give you any instructions?

A. No instructions.

Q. Did he suggest what you should do?

A. None whatever.

Q. What did he tell you he would do, if anything?

A. He said, "Well, I am very glad to co-operate

(Testimony of Robert A. Coulter.)

with you; I will send out a couple of my men." I said, "That is all we want." [174]

Q. All right. What followed then?

A. The men arrived in an automobile about the time of my arrival, and they remained out on the sidewalk, and we made our request for an entrance from the owner of the premises, and we entered the runway, and saw the liquor, saw the goods which we presumed to be liquor, and upon the strength of that I advised the Federal Officers to come in and take possession, which they did.

Q. During the entire time from the time that you talked to Mr. Paget, you and the Federal Prohibition Department were co-operating with one another?

Mr. GILLIS.—To which I object as calling for the conclusion of the witness. Let us have the facts.

The COURT.—The objection is sustained. You may ask him however, just exactly what they did and said to one another.

Mr. SMITH.—Q. Captain Coulter, after the arrival of the Prohibition Officers on the scene—you say they arrived on the scene about the same time as you? A. Yes.

Q. What was said by the officers to you, and what did you say to them, and what was done by them?

A. Well, upon their entrance to the garage, we looked over the property contained therein, and I advised them that we had no further jurisdiction

(Testimony of Robert A. Coulter.)

in the matter, that the seizure of the liquor was strictly up to them, but I would leave an officer there to take a memorandum for my information, showing what was taken out of that garage that day; that report was submitted to me by one of the officers, the report of which I have given to you.

Q. With reference to the seizure of this property you had nothing to do other than what you have stated? A. That is all. [175]

Q. The entire seizure was made by the Prohibition Officers. Is that correct? A. Yes.

Mr. GILLIS.—I object to that as calling for the conclusion of the witness. Let the facts speak for themselves.

The COURT.—I suppose that calls for a fact. He is asking him, in effect, what was done with regard to taking the liquor, I will allow the question.

Mr. SMITH.—Q. You never at any time took this liquor into your custody, did you?

A. What is that?

Q. You never at any time took this liquor into your custody, did you? A. No.

Q. You never exercised any control over it?

A. None whatever.

Q. Mr. Paget remarked, as you say, that he was very glad that you were co-operating with him?

A. He would be very glad to co-operate with me in the matter.

(Testimony of Robert A. Coulter.)

Q. Thereafter, whatever was done was done by the Prohibition Agents? A. Everything.

Mr. SMITH.—That is all. Now, may it please the Court, I will ask that the entire testimony be stricken out on the ground that the entrance to the place was unlawful.

The COURT.—Have you read the decision of this morning?

Mr. SMITH.—I read the newspaper account, but I have not read the opinion.

The COURT.—I have seen it. I think we had better see it now. Have you seen it, Mr. Gillis?

Mr. GILLIS.—No.

The COURT.—The Court of Appeals handed down a decision upon this identical question in the case of Slim Forni.

Mr. SMITH.—I don't know what the opinion is.

The COURT.—I think we had better get it. I will be glad if you will get it for me, Mr. Gillis. We will take a short [176] recess.

The COURT.—What are these premises?

A. Residence.

Q. What does it consist of?

A. Well, I would say a six-room house with a garage underneath.

Q. The garage is right underneath the house, is it? A. Directly underneath.

Q. The door for the entrance of automobiles is from the street?

A. From the street.

(Testimony of Robert A. Coulter.)

Q. Is there any other entrance to the garage except through the front door, where the automobiles go in and out?

A. That was the only entrance except the one we entered through that had been busted through.

Q. Where was it you said that was?

A. That was on the runway.

Q. Where was the runway?

A. On the left of the house.

Q. What was the runway for?

A. To go into the rear of the premises, that is what is ordinarily called an alleyway, running the entire length to the back stairs.

Q. You went up the front steps, did you?

A. Yes.

Q. Rang the bell? A. Yes.

Q. What was the name of the owner?

A. Curran.

Q. Did Curran live there?

A. He answered the doorbell.

Q. Did you observe whether or not it was a dwelling-house, that is, was there furniture of a dwelling-house in there?

A. We did not enter, no; he held the door just partly open and conversed with us through the opening.

Q. Did he tell you how to get into the garage?

A. No, he said he had a key to the garage. He did have a key to the runway, and he would try to find it, and he returned in possibly five or ten min-

(Testimony of Robert A. Coulter.)

utes afterwards with the key to the door leading into the runway and admitted us there.

Q. That was a door in a wall?

A. Yes, entirely closed; that [177] was our only way of entrance.

Q. When you saw this liquor, could you tell what it was, at all?

A. No, we could not determine what it was.

Q. Was it in boxes and sacks?

A. Yes, the sacks were packed up, and barrels and cases, some partly open; you could see the necks of bottles sticking up here and there; it was the odor that led us to believe that it contained liquor.

Q. Could you see any of the labels on the boxes?

A. No—you mean telling what they contained?

Q. I mean labels on the boxes, indicating whether the liquor was imported or not?

A. Some of the champagne boxes were burned in with the customary label.

Q. Could you tell that was imported?

A. Apparently so.

The COURT.—The Court of Appeals, gentlemen, in the Forni Case, in its decision, uses this language: "Under the facts we think the only reasonable inference was that the garage was used for a business purpose, the storage of a large quantity of contraband liquor. The possession of cases of liquor which bore no evidence of having been through the Custom House or stamped, was *prima facie* evidence that the liquor was being kept for pur-

(Testimony of Robert A. Coulter.)

poses of sale." In the Forni Case, however, there was a search-warrant, Mr. Gillis. I think this is a very doubtful proposition.

Mr. GILLIS.—Q. You say the owner had no key to the garage? A. No.

Q. Did you get any information as to who had the key?

Mr. SMITH.—We will object to that on the ground it is hearsay.

The COURT.—I should think so. You mean information from the man who was there?

Mr. GILLIS.—From any place. [178]

The COURT.—I presume that the man who was in charge there, if there was a conspiracy, would be a co-conspirator. Objection overruled. He may answer.

Mr. SMITH.—That man is not charged as a co-conspirator.

The COURT.—What is the difference? The principle is well settled, where a conspiracy is charged, there may be proof offered in regard to the persons charged, or anybody else.

Mr. SMITH.—Note an exception.

The COURT.—You may answer.

A. The owner of the premises denied having any keys to the garage proper. He did admit that he had the key to the gate leading into the alleyway alongside.

Mr. GILLIS.—Q. Did he say who had the key to the garage?

A. I did not ask him that question.

(Testimony of Robert A. Coulter.)

Q. Did he say who had leased the garage from him?

Mr. SMITH.—Just a second, we object to that on the ground it is immaterial, irrelevant and incompetent, and purely hearsay.

The COURT.—Overruled.

Mr. SMITH.—Exception.

A. He did.

Mr. GILLIS.—Q. Who did he say leased the garage from him?

A. He reported he leased the garage to a man named Marron, who resided on Steiner Street.

Q. Did you see a hole in the rear of that garage, or in the side of it any place?

A. Yes, on the side wall.

Q. What kind of a hole was that, Captain?

A. Well, it appeared to be a breaking out of the wall.

Mr. SMITH.—We will object to that on the ground that it calls for a conclusion and opinion of the witness as to what kind of a hole it appeared to be.

The COURT.—He has described the hole. That is proper enough. [179] Overruled.

Mr. SMITH.—Exception.

A. The hole possibly was 3 by 3, 3 feet by 3, and enough to admit a person without tearing his clothes.

Mr. GILLIS.—Q. Did the hole have the appearance of being sawed out clean?

A. Oh, no; very jagged.

(Testimony of Robert A. Coulter.)

Q. As though it had been broken

A. Forcibly broken from the inside.

Q. Did you see any liquor in the back yard?

A. I did not.

Q. Did you see anybody going through the back yard? A. No.

Q. When you gained admission to the garage, you went in through the hole that had been made there? A. The hole in the wall.

The COURT.—Q. Did you have any talk with this man after the liquor was found, Captain?

A. No. As soon as the prohibition authorities took possession, I left the scene immediately and did not return.

The COURT.—I will reserve the ruling, Mr. Smith, I am not clear about it. I will reserve it until this evidence of the prohibition officer is here. Go ahead with the cross-examination.

Mr. SMITH.—I am through.

The COURT.—Any further questions, Mr. Gillis?

Mr. GILLIS.—That is all.

(R. Tr. Vol. 2, pp. 92–104, inc.)

TESTIMONY OF WILLIAM F. CURRAN, FOR THE GOVERNMENT.

WILLIAM F. CURRAN, a witness called for the United States, and sworn, testified as follows:

Direct Examination.

(By Mr. GILLIS.)

I reside at 3047 California Street. My wife and I have an interest in that property. There is a

(Testimony of William F. Curran.)

mortgage upon it. We have been living there a little over three years. [180]

Q. In January of 1924, did you make any addition to your house, put on a garage?

Mr. SMITH.—Objected to on the ground that it is immaterial, irrelevant and incompetent.

The COURT.—Overruled.

Mr. SMITH.—Exception.

A. I put in a garage in the early part of the year. I could not say just what month it was, but I guess it was in January.

The WITNESS.—(Continuing.) The early part of January I built it to rent to anyone who would pay the most money for it. Mr. Marron rented it from me, Eddie Marron, one of the defendants in this case. He rented it from me as soon as it was completed. I could not tell exactly; early part of the year.

Q. How much rent did he pay you for it?

Mr. SMITH.—Objected to on the ground it is immaterial, irrelevant and incompetent.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

A. Well he paid $50 a month for about three months, and afterwards $25.

Mr. GILLIS.—Q. Did he state what he wanted it for?

Mr. SMITH.—Objected to on the ground it is immaterial, irrelevant and incompetent.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

(Testimony of William F. Curran.)

A. Yes, he wanted to store some stuff in there.

The WITNESS.—(Continuing.) He did store some stuff in there. I saw it when it was taken out. It looked like liquor to me, in packages. I knew it was liquor that he was storing in there. He rented the place from me until it was raided. I think it was in August. I saw him go in and out of the garage sometimes— [181] a few times.

The COURT.—Q. Was he taking liquor in and out when you saw him?

A. I never saw him take any in there.

Q. You saw him take it out?

A. I didn't know what he would take out. He would drive in and out. I could not tell you what he took out.

Q. He drove his car right into the garage, and drove right out again? A. Yes.

Q. You knew, I suppose, that it was liquor, didn't you?

A. I could not tell, only what I suspected.

Q. Did you smell it?

Mr. SMITH.—I ask that that go out as immaterial, irrelevant and incompetent.

The COURT.—Yes, strike that out "what I suspected."

Q. Did you smell it? A. No, I didn't.

Q. How did the hole happen to be there in the wall on the side of this little runway?

A. There used to be a little door in there.

Q. Do you know how that was smashed out?

A. It was broken out the day of the raid.

(Testimony of William F. Curran.)

Q. The day of the raid? A. Yes.

Q. By whom?

A. I don't know. I could not tell you.

The WITNESS.—(Continuing, to Mr. Gillis.) I saw Mr. Marron the day of the raid. He was at the premises. I think he was in the garage. I saw him just before the police officers came. I saw him at the time the police officers were there. He came there while they were there.

Mr. SMITH.—We will object to that on the ground that it is assuming something that is not in evidence. This witness has not testified that he saw him doing anything.

The COURT.—Overruled. [182]

Mr. SMITH.—Exception.

A. Well, he was talking to the police officers, and the policemen told me I had better go upstairs and get out of sight, because Rutter's men were coming, so I did, so I don't know what he did.

Mr. GILLIS.—Q. You didn't see him after that?

A. No.

Cross-examination.

(By Mr. SMITH.)

When the police came to my door my wife opened the door first, and they told her they had a report that the place was unsanitary, and wanted to inspect it. They told me the same thing afterwards. I was in the yard at the time, and they came through the house, and my wife called me and I came up, and they said they had a report of the place being unsanitary, so she opened the door and

(Testimony of William F. Curran.)

let them walk through, and she opened the door for the bath and toilet so they could see. She said they did not seem to pay much attention to it at all, passed right through to the back, went clear through to the back. Then they went out the front door again, and then asked me to open the garage, and I told them that I didn't have a key, I could not open it. My wife said the officers walked right through. They didn't seem to look to the right or to the left. They seemed to want to inspect the garage more than anything else. I occupy the place as a private dwelling, myself and my wife.

The COURT.—The motion made to strike out the evidence of Captain Coulter, of course, must now be denied. While it is true that no officers of the law, either prohibition officers, or police, either, have the right to enter any part of a private dwelling in a search for liquor, unless there is evidence of sales [183] having taken place there, and it is probably also true that a garage is part of the private residence, but it ceases to be a part of the private residence when it is rented for the express purpose of storing liquor. The motion, therefore, will be denied.

Mr. SMITH.—We note an exception, may it please the Court, and I want further to urge, may it please the Court, in support of my motion to strike out the evidence given by Captain Coulter, the fact that the officers had no right to enter any business place, regardless of what was stored there, without a warrant; simply because a place is a

business place, that is no reason why anyone, particularly a police officer or a prohibition agent, might walk in. A home isn't the only place, as I understand the law.

The COURT.—No, but you see you come to an entirely different proposition there. You come then to the proposition that they had reasonable cause to believe that a crime was being committed there, and the evidence there so indicated. Captain Coulter testified there was a strong odor of liquor there, and they looked through and saw the liquor. That is a very different proposition. Of course, the purpose of the prohibition law in regard to a man's home is that he has a right to have there lawfully acquired liquor for the *bona fide* use of himself and his guests, and he has a right to keep it in his garage, or any other part of his place that he pleases. But immediately upon his renting any part of his premises to somebody else for the storage of liquor, it ceases to be any part of his home, and cannot possibly be liquor for the *bona fide* use of his guests, for the simple reason that he has no control over it, or anything to do with it. Now then, it becomes, as the Court of Appeals said in that Forni case, a place of business, and therefore, if the evidence of their senses were such that it indicated [184] there was liquor there, they had a right to enter.

Mr. SMITH.—The Court is assuming, I take it, for the purpose of the ruling, that all of these facts were known to the officers at the time that they entered. It developed by the testimony that the offi-

cers had to ask questions to find out what the true state of facts were; they did not know who this property belonged to at the time that they entered and they had no idea who it belonged to, until they asked questions in order to find out.

The COURT.—I am quite clear about it.

Mr. SMITH.—As far as the Forni matter is concerned, that is purely the proposition of a search-warrant.

The COURT.—Yes, there was a search-warrant, but the opinion of the Court covers it.

Mr. SMITH.—The Forni matter simply goes to the sufficiency of the averments in the affidavit for the purpose of having issued thereon a search-warrant.

The COURT.—The motion is denied.

Mr. SMITH.—Note an exception.

Mr. TAAFFE.—I want the Government at this time to enter into a stipulation with reference to Captain Coulter and Mr. Curran, the witnesses on the stand, in using the word promiscuously of police officers—did not in their testimony refer to either of the defendants Kissane or Gorham, that are now on trial.

Mr. GILLIS.—I don't know what you mean.

Mr. TAAFFE.—Captain Coulter said that his men, his police officers, had assisted in making some sort of a raid, and Mr. Curran said the police officers had informed him that he had better go upstairs, because the prohibition agents were coming. We want a stipulation that that testimony did not

(Testimony of E. O. Vaughan.)

refer to either of these defendants on trial as being the police officers that were there present. [185]

Mr. GILLIS.—At that time?

Mr. TAAFFE.—Yes.

Mr. GILLIS.—There is no claim on behalf of the Government that either the defendant Kissane or Gorham were present at this particular raid.

Mr. TAAFFE.—That is all we want.

(R. Tr., Vol. 2, pp. 105–111.)

TESTIMONY OF E. O. VAUGHAN, FOR THE GOVERNMENT.

E. O. VAUGHAN, a witness called for the United States, and sworn, testified as follows:

Direct Examination.

(By Mr. GILLIS.)

I am, and for about twenty years last past have been, an accountant. I know Mr. Birdsall, one of the defendants in this action. I have known him probably two or three years. In the early part of 1924 I had occasion to visit 1249 Polk Street. I saw Mr. Birdsall there at the time. I had a conversation with him with reference to the accounts that he was keeping there at the time. He asked me to add up the books for him. (The attention of the witness was here directed to United States Exhibit 3)

Mr. SMITH.—We will object to all this testimony on the ground that it is improper under the Gouled decision; the Gouled case goes directly to the point that I am making now, that is a man's

(Testimony of E. O. Vaughan.)

record cannot be used against him in a criminal proceeding, any more than he would be compelled to testify against himself, because in either event he would be the unwilling source of evidence as against himself. The Supreme Court has passed [186] directly upon that point, and I respectfully urge it at this time.

The COURT.—Overruled.

Mr. SMITH.—Exception.

The WITNESS.—(Continuing.) I recognize this book.

(The attention of the witness was here directed to United States Exhibit 16.)

The WITNESS.—(Continuing.) Yes, I recognize Government's Exhibit 16. The handwriting on this is mine. I made that summary.

Mr. SMITH.—That is objected to upon the ground that it is immaterial, irrelevant and incompetent.

The COURT.—Overruled.

The WITNESS.—(Continuing.) United States Exhibit 16 was made from United States Exhibit 3. I first began keeping the account or keeping the summary about the early part of March. The February totals are my figures. From that time until the end of September, or until the September statement, I think I made the summary from the book each month. The first item on page 86 is June. At the top of the page, the name "Vaughan" is my name. The item "$10" was made by me. That was my monthly charge for making this up.

(Testimony of E. O. Vaughan.)

(The attention of the witness was here directed to three cross-marks on page 81, opposite which are the figures $170, and the witness was directed to explain the significance of the three cross-marks.)

Mr. SMITH.—We will object to the question upon the ground that it is assuming something that is not in evidence, and furthermore, that this witness has not heretofore testified that the cross-marks signify anything.

The COURT.—Do you know what they signify? [187]

The WITNESS.—(Continuing.) I know the items, but I don't know exactly what the payments represent. I know what go to make up the figures that are opposite these three cross-marks. The items I can pick out here. They are items marked here "Kissane" and "Police" items. I think I did have instructions from Mr. Birdsall with reference to making up that particular item. The instructions were to make them up in one total, as I have shown them here. Those items marked "Police," "Kissane" and "Gift," or something of that character, were all together in that total. He didn't tell me to put down just simply crosses instead of what the items really were. I don't recall any specific instructions. He said just to show these items separately, but I don't now recall any instructions.

(The attention of the witness was then directed to United States Exhibit 3, page 87.)

The WITNESS.—(Continuing.) The summary on that page is in my own handwriting. The three

(Testimony of E. O. Vaughan.)

crosses with the figures $195 are in my handwriting. The same items in the month of June accounts went to make up the $195.

(The attention of the witness was then directed to page 94, United States Exhibit 3.)

The WITNESS.—(Continuing.) The summary for the month of July, 1924, on that page is in my handwriting, and the four cross-marks with $180 opposite, is made up of the same items, "Kissane," "police," "gifts."

(The attention of the witness was then directed to page 101 United States Exhibit 3.)

The WITNESS.—(Continuing.) The summary on that page for the month of August, 1924, is in my handwriting, and the three cross-marks with the $180 opposite that figure, are made up [188] from the items "Kissane," "Gifts," "Police," and on page 107, the summary is made up in my handwriting, and the five cross-marks, with the figures $170 opposite, for the month of September, 1924, is made up from the total of the three items, "Kissane," "Police," "Gifts," for the month of September. United States Exhibit 16 is a statement from the books for the month of September, the totals. It is intended for a profit and loss statement for the business that was carried on there, according to the book, for the month of September, 1924.

(The attention of the witness was then directed to pages 80 and 81, at the top of page 80, under date of May 19, 1924.)

(Testimony of E. O. Vaughan.)

The WITNESS.—(Continuing.) The item "Gov. fine $500," and on the opposite page, 81, "½ fine $250," is in my handwriting. That indicates one-half of the item shown over here, the $500, one-half of the item on page 80, it appears chargeable to some individual. It was chargeable to Birdsall. It says "Bird." I presume it was Birdsall.

The COURT.—What was that $500 for?

A. Well, it says there "Gov. fine."

The WITNESS.—(Continuing, to Mr. Gillis.) I usually went there to make up these books about the first of the month, or as soon after as I could. I think it was around the first. I usually saw Birdsall there. I don't know of any conversation we had after I once got started about making up the different items of the book. I usually just went ahead the same as the preceding month. I saw Mr. Eddie Marron there. I usually went into the front room of the flat to make up the summary. Occasionally Mr. Marron and Mr. Birdsall had been in the room when I was working on it; maybe not continually; probably there were times when they were not present. Occasionally one would [189] be present, and sometimes both of them. That went on up to the time that I made the last statement for the month of September. I don't know who gave me the book when I first went there. I presume Birdsall handed it to me when I first started in. He was the first man that I took it up with reference to keeping the books. I received instructions

(Testimony of E. O. Vaughan.)

from him at that time with regard to the salary I was to receive and what I was to do.

Q. Look at Government's Exhibit 16, which is the September profit and loss statement, Mr. Vaughan. I would like the jury to get a view of this at the same time. You have got an item there, "Slot machine, $254."

Mr. SMITH.—Just a second. We will object to that on the ground it is purely immaterial, irrelevant and incompetent. The defendants here are not charged, or any of them charged with maintaining slot machines, and I assume that the question is simply asked for the purpose of prejudicing the jury in the consideration of the evidence.

Mr. GILLIS.—I will say it is not, Mr. Smith.

Mr. SMITH.—We will object to it on the ground it is highly improper.

The COURT.—It shows the relations between these parties. I do not think the jury is going to convict these men of conspiracy because they had slot machines there, but the financial arrangements, division of the money, are all matters to be considered in connection with the charge that they conspired. I will overrule the objection.

Mr. SMITH.—Note an exception.

Mr. GILLIS.—Q. Where did you get the items to make up the figure $254, Mr. Vaughan?

A. Isn't it in the book, there?

Q. Glance back and see. A. There it is. [190]

Q. You received that from page 106, which would be the summary for September?

(Testimony of E. O. Vaughan.)

A. Yes, September.

Q. Now, I call your attention to an item of "salaries $840." Do those salaries appear in that book, or were you given that amount?

A. I will look in the book, I can't recall all the details. Here is part of it. As I recall it, $20 a day was charged for Birdsall.

Mr. SMITH.—I will ask that that go out as being immaterial, irrelevant and incompetent, and not responsive to the question. He was asked about a particular item. Will you read the question, Mr. Reporter?

The COURT.—I remember the question. He was asked what went to make up the item of salaries, and the answer was $20 a day was paid to Mr. Birdsall. The motion is denied.

Mr. SMITH.—Exception.

A. (Continuing.) And this item marked "Charles, $240," makes $840.

Mr. GILLIS.—Q. Who was Charles?

Mr. O'CONNOR.—If he knows.

Mr. GILLIS.—Q. If you know.

A. There was a fellow there by the name of Charles, and I presume it was paid to him.

Mr. O'CONNOR.—I ask that this presumption go out.

Mr. GILLIS.—Q. Did you know any other employee there on the premises, Mr. Vaughan?

A. Did I know any?

Q. Yes. A. This fellow Charles.

Q. Did you know him?

(Testimony of E. O. Vaughan.)

A. Well, I met him there.

Q. Did you know his last name? A. Yes.

Q. What was his last name? A. Mahoney.

Q. Does the word "Charles" refer to that individual, if you know?

Mr. O'CONNOR.—That has been asked and answered. [191]

A. As I said before, I presume so, but I did not see the money paid, or anything like that.

The WITNESS.—(Continuing.) I don't know of anybody else who were employees there except Mr. Mahoney. The two letters here "E. M.," with the figures "600" opposite them, refer to E. Marron, and the $600 was his payment there for September, the amount he received in September. Further, below, "E. M. proportion $293.55, G. B. proportion $293.55," the latter "E. M." refers to E. Marron, and "G. B." refers to G. Birdsall. The items referred to show the balance there of $587.10, after charging off the $600, taking that away from it, and then that was divided up equally. I received instructions from Mr. Birdsall with reference to the manner in which these figures should be set down and deducted. He said after the expenses had been deducted from the receipts, then that amount should be deducted, and the balance equally divided between them.

Q. Do I understand that from the net proceeds the defendant Marron was to receive $600 and after that $600 had been deducted that the balance was

(Testimony of E. O. Vaughan.)

to be divided equally between Eddie Marron and George Birdsall—

Mr. SMITH.—Just a second.

Mr. GILLIS.—Q. (Continuing.) Is that correct?

Mr. SMITH.—Have you finished?

Mr. GILLIS.—Yes.

Mr. SMITH.—We will object to that on the ground that it is leading and suggestive.

The COURT.—Overruled.

Mr. SMITH.—I submit, may it please the Court, that Mr. Gillis says he understands. Let us have what the witness understands.

The COURT.—The objection overruled.

Mr. SMITH.—Note an exception.

A. That was my understanding. That is the reason I did it in that manner. [192]

The COURT.—Mr. Smith, have you examined that Sayers Case?

Mr. SMITH.—Yes, your Honor.

The COURT.—It is as squarely in point as anything could be.

Mr. SMITH.—I do not know how it could be, your Honor. I have gone over the whole thing. As I understand the situation, the opinion was written by Judge Bourquin, sitting as a Circuit Judge temporarily. After the decision came down I went into the chambers of Judge Rudkin and discussed the matter with him, and he said that these matters were purely incidental and were not considered by the Court. But, after reading the decision, I have

come to this conclusion, that possibly they attempt to distinguish between the Gouled case and that case in that the records in that particular case were public records, or the records only of others than the persons on trial. For instance, in that case there was a bank book, and that evidence was easily accessible and obtainable.

The COURT.—Not at all. The distinction was clear as between the case of Adams and the case of Gouled; I have not any doubt about that at all. In the Gouled case the papers were taken surreptitiously, and the gist of the Gouled Case was that the seizure of papers by stealth and trick was as much a violation of the constitutional rights as a seizure by force. Even the Gouled case, itself, points out, as Judge Bourquin says in the Sayers Case, that there is nothing particularly sacred about papers. And, as Judge Bourquin points out in the Sayres Case, it is distinctly held in the Adams Case, or, rather, in the Boyd Case, that where entry is made on a valid search-warrant while a crime is actually being committed, that any evidence of that crime that happens to be found there can be seized and used. That is the clear language of the Sayers Case. Of course, I am bound by the decision, and not by any conversation with any judge about it. [193]

Mr. SMITH.—I appreciate that, your Honor, but the Court seems to be overlooking entirely one of the six points made by the appellant in the Gouled Case, and that is the point that appertains

entirely to the Fifth Amendment to the Constitution of the United States, the matter of self-incrimination; the point was considered separately and entirely distinct from the question of unlawful seizure. The matter there discussed was one compelling a defendant, one on trial, to take the witness stand against himself.

The COURT.—I know the Gouled Case very well. That was one of the questions certified up, and, of course, the Supreme Court held, and properly held, that the secret and furtive seizing of a man's papers is compelling him, indirectly, to be a witness against himself. I have no doubt about that. But that is a very different thing from the taking of evidence, where a man is arrested in the act of the commission of a crime, as is pointed out in the Boyd Case, and Judge Bourquin refers to it, that if a man's property was searched on a search-warrant for stolen goods, it would be absurd to say that tools of his burglary would not be equally seizable. I am clear on this, Mr. Smith.

Mr. SMITH.—We are in perfect accord with reference to the matter of seizure, but we are not in accord as to the matter decided by the Supreme Court on one of the questions certified, and that is the question of the relevancy and competency.

The COURT.—You will note also that the Court of Appeals, in the Sayers Case, considered the Gouled Case, and in the opinion of the Court of Appeals the Gouled Case is direct authority for the decision of the Sayers Case.

(Testimony of E. O. Vaughan.)

Mr. SMITH.—They just took up a portion of the Gouled Case.

The COURT.—It is unfortunate that the Gouled Case is referred to as the Gould Case, but that is evidently merely a typographical error. [194]

Mr. SMITH.—Yes. The Sayers Case simply took up a portion and referred to that portion of the Gouled Case, and said there was no special sanctity in papers, but it did not discuss or did not involve the question of using writings of a person on trial. They were purely writings of other persons.

The COURT.—If you have anything to offer when the case is concluded, before the case goes to the jury, I will hear you on it, but I am quite clear as to what the Sayers case means at the present time. You may proceed, Mr. Gillis.

Mr. GILLIS.—Q. Mr. Vaughan, will you look at the bottom of page 69, an item there mentioned, "New Police $90"; that is in your handwriting, is it? A. Yes.

Mr. SMITH.—What is the item referred to?

Mr. GILLIS.—"New Police $90."

Mr. SMITH.—I cannot agree with you that that is what it says there. It looks to me like "New Policy."

Mr. GILLIS.—Q. Did someone give you instructions with reference to putting that in there, Mr. Vaughan?

A. They must have, otherwise I would not have

(Testimony of E. O. Vaughan.)

written it, not knowing anything about any payment of any kind.

Q. Do you know who gave you those instructions?

A. Well, I can say Mr. Birdsall, although I do not recall the incident just now.

Q. That is the best of your recollection?

A. Yes.

The COURT.—Is it "New Police," or "New Policy"? A. It looks like "Policy" here.

Q. Do you remember?

A. I do not recall the item, no.

Mr. GILLIS.—Q. Do you recall the incident at all?

A. No, nothing about it, nothing in my mind now on it, it is my writing, but I do not recall writing it there, that is, any special incident connected with it. [195]

Q. You have no recollection as to what that particular item is?

Mr. O'CONNOR.—Objected to on the ground it has been asked and answered.

The COURT.—I will let him answer again. You may answer.

Mr. O'CONNOR.—Exception.

A. No, I do not recall.

WITNESS.—(Continuing.) The only recollection I have of the first time I went into the place is from the books. I see my figures at the end of February.

Q. Before you took up the matter of keeping

(Testimony of E. O. Vaughan.)

the books with Mr. Birdsall, had you gone into that place?

Mr. SMITH.—That is objectionable on the ground it is immaterial, irrelevant and incompetent.

The COURT.—The objection is overruled.

Mr. SMITH.—Exception.

A. I do not recall now whether I had or not.

WITNESS.—(Continuing.) I had purchased drinks in that place. I don't know what I had purchased,—whiskey, I suppose. I don't remember whom I bought it from. I would not say who happened to be there. I suppose either Birdsall or Mahoney. I was there from March on of 1924. I suppose I had a drink in there every time I was in there. For this purpose I was there once a month. I may have dropped in other times off and on.

Cross-examination.

(By Mr. SMITH.)

I was never served any liquor in that place by Mr. Marron.

Cross-examination.

(By Mr. GREENE.)

I do not know the defendant Walter Brand. From an examination of the records of this establishment and conversation with the proprietor I do not know when the defendant Brand severed his [196] connection with the place. I don't know anything about it at all. I went there throughout the year 1924, from about March on,

(Testimony of E. O. Vaughan.)

for the purpose of examining the books, up to about the end of September, I think, to the best of my memory. I never saw the defendant Brand there; that is, I don't know the man.

Q. Who is the man sitting in the end seat there

A. I do not recall ever having seen him.

(R. Tr., pp. 111–126.)

TESTIMONY OF L. H. COLEMAN, FOR THE GOVERNMENT.

L. H. COLEMAN, a witness called for the United States, and sworn, testified as follows:

Direct Examination.

(To Mr. GILLIS.)

I am an adjuster for the Spring Valley Water Company. I have with me the records from our office as to the charges against 1249 Polk Street for the year 1924.

Mr. O'CONNOR.—Objected to on the ground it is immaterial, irrelevant and incompetent.

The COURT.—Overruled.

Mr. O'CONNOR.—Exception.

WITNESS.—(Continuing.) The instrument I hold in my hand is an official record of the Water Company.

Q. From that record, can you tell as to whom the water was charged for the year 1924?

Mr. SMITH.—That is objected to on the ground that the instrument will speak for itself.

(Testimony of L. H. Coleman.)

The COURT.—That is merely preliminary. I will overrule it.

Mr. SMITH.—Exception.

A. In the name of Eddie Marron. [197]

Mr. SMITH.—I will ask that it go out.

The COURT.—Yes, that is not responsive. You are simply asked if you can tell from that.

A. Yes.

Mr. GILLIS.—What does the record show with reference to that?

Mr. SMITH.—I will object to that question on the ground that the instrument speaks for itself.

The COURT.—Yes, that is true.

Mr. GILLIS.—I offer the record of the Water Company in evidence as the Government exhibit next in order.

Mr. SMITH.—We will object to its introduction on the ground that it is immaterial, irrelevant and incompetent.

The COURT.—The objection is overruled.

Mr. SMITH.—No foundation has been laid for it.

The COURT.—It is part of your regular records? A. Yes.

The COURT.—There is no need of keeping it here, is there

Mr. SMITH.—I have no desire to keep it.

The COURT.—Then read it into the record and let the witness take it back.

(The record referred to follows.) [198]

Mr. GILLIS.—Q. I show you Government's Ex-

(Testimony of L. H. Coleman.)

hibit 15 for Identification and ask you if you recognize that? A. Yes.

Q. What is that instrument?

Mr. SMITH.—I object to that on the ground that the instrument will speak for itself as to what it is.

The COURT.—That might be and it might not be. It is a question of identification.

Mr. GILLIS.—The objection yesterday was that it was not properly identified. Now I am attempting to properly identify it.

The COURT.—The objection is overruled.

Mr. SMITH.—Note an exception.

A. This is a receipt of the Water Company, stamped by perforated stamps, September 5, 1924; that is a receipt under the name of Eddie Marron taken from the Water Company.

Q. That is the regular Water Company bill?

A. The regular Water Company bill.

Mr. GILLIS.—I now ask that this be introduced in evidence, your Honor.

Mr. SMITH.—We will object to its introduction on the ground it is immaterial, irrelevant and incompetent, and no proper foundation has been laid for its introduction.

The COURT.—Overruled.

Mr. SMITH.—Exception.

(The document was here introduced in evidence and marked "U. S. Exhibit 15.")

Said exhibit was and is in the following words and figures:

(Here insert exhibit.) [199]

(Testimony of Charles J. Heggerty.)

Mr. GILLIS.—I wish to call the jury's attention to this exhibit for 1249 Polk Street, the two names at the bottom of the column, "*F*eorge Hawkins, 10/2/22, Close 1121 Bush Apartment No. 3," underneath that name, "Eddie Marron, Mail 11/21/23," giving the charges for water at that place in the years 1923 and 1924.

(R. Tr. pp. 126–128.)

TESTIMONY OF CHARLES J. HEGGERTY FOR THE GOVERNMENT.

CHARLES J. HEGGERTY, a witness called for the United States and sworn, testified as follows:

Mr. SMITH.—May it please the Court, before we start taking the testimony of Mr. Heggerty, may the record show that my objection offered yesterday to the introduction of these papers that were seized be incorporated, together with my objection of to-day

The COURT.—Yes.

Direct Examination.

(By Mr. GILLIS.)

I reside at 1518 14th Street, Sacramento, and my business is a statistician in the office of the Secretary of State.

Q. Have with you the affidavit of candidate of Eddie Marron? A. Yes.

Mr. SMITH.—We will object to that on the ground it is immaterial, irrelevant and incompetent.

(Testimony of Charles J. Heggerty.)

The COURT.—This is merely preliminary.

Mr. GILLIS.—Preliminary is all.

The COURT.—Overruled.

Mr. SMITH.—Exception.

WITNESS.—(Continuing.) I recognize that instrument. It is [200] one of the official records of the Secretary of State's office.

Mr. GILLIS.—I ask that this instrument be introduced in evidence.

Mr. SMITH.—To which we object on the ground it is immaterial, irrelevant and incompetent, and no foundation laid.

Mr. GILLIS.—I will state to the Court that the purpose of the introduction of this instrument is for the furnishing of an exemplar of the handwriting of Mr. Marron.

Mr. O'CONNOR.—Has Mr. Heggerty identified that handwriting?

Mr. GILLIS.—It is an official document filed with the Secretary of State.

Mr. O'CONNOR.—That certainly is not a proper way to prove the handwriting of a defendant, if your Honor please.

The COURT.—This is an official record of the State of California? A. Yes.

Q. The Secretary of State acts upon this in issuing his certificate, does he not, of the candidacy?

A. Yes. The Political Code provides no candidate shall appear on the ballot unless his affidavit is filed.

The COURT.—That is made in accordance with the provisions of the statute of the State of California requiring it to be filed and acted upon by the officials, and Section 1881 or 1880 of the Code of Civil Procedure of the State of California provides that a comparison may be made with writings which have been acted upon. The objection is overruled.

Mr. SMITH.—As I understand the law as to the proving of handwriting, there are only two ways that it may be proved: first, by one who has actually seen the writing made; and, secondly, by someone who is familiar with the handwriting of the person whose writing it purports to be. I submit that the document in question is incompetent. [201]

The COURT.—You have omitted the third.

Mr. SMITH.—What is the third?

The COURT.—That is by comparison of the disputed writing with a writing which is established to be the writing of the person who is alleged to have executed the disputed writing, or upon which he has acted.

Mr. SMITH.—That has not been established.

The COURT.—Oh, yes. The Political Code requires the filing of an affidavit by a person who is a candidate for a public office with the Secretary of State. That was done and was acted upon by the Secretary of State, the witness says, upon that writing.

Mr. SMITH.—Yes, but may it please the Court, the defendant Marron here had not been identified

as the individual who filed this paper, or has not been identified as the individual whose writing it is. There is no showing here, or no foundation laid for the introduction of that paper. That might be some other Edward Marron, for all we know.

The COURT.—But there is another maxim of jurisprudence, and that is the identity of persons and the identity of names, and if he is not the person named there of course it may be shown. I will overrule the objection.

Mr. SMITH.—Note an exception.

Mr. GILLIS.—Now, may it please the Court, may a photostat copy of this original be introduced?

Mr. SMITH.—We will stipulate that the original may be withdrawn and the photostat copy put in its place, but we do not want that stipulation to at any time establish as a fact that we have consented to the introduction of the document, itself.

The COURT.—Not at all. [202]

(The document was here introduced in evidence as "U. S. Exhibit 18.")

Said exhibit was and is in the following words and figures:

(Here insert exhibit.)

(R. Tr. pp. 129–131.)

TESTIMONY OF EDWARD T. O'DONNELL, FOR THE GOVERNMENT.

EDWARD T. O'DONNELL, a witness called for the United States and sworn, testified as follows:

Direct Examination.

(By Mr. GILLIS.)

I am employed by the Pacific Telephone & Telegraph Company as a supervisor. I have not the records showing the total charges against 1249 Polk Street for the year 1924. I have not the bills against that particular place outside of the final statement. I have the final statement. It is an official record of the company, a part of the regular records of the company and pertains to 1249 Polk Street.

Mr. GILLIS.—I ask that this be introduced in evidence and marked Government's exhibit next in order.

Mr. SMITH.—I will object to it on the ground it is immaterial, irrelevant and incompetent, and has no bearing on the issues in this case, and no proper foundation has been laid for its introduction. [203]

The COURT.—I do not think the note at the bottom is admissible, Mr. Gillis.

Mr. GILLIS.—I did not notice that, your Honor.

The COURT.—That is some remark made by somebody connected with the company.

(Testimony of Edward T. O'Donnell.)

Mr. GILLIS.—I am perfectly willing that that be excluded.

The COURT.—The rest of the document will be admitted.

Mr. SMITH.—We note an exception.

(Thereupon the document was introduced in evidence and marked "U. S. Exhibit 19.")

Said exhibit was and is in the following words and figures:

(Here insert exhibit.)

(The attention of the witness was directed to a document marked "11/5/26.")

This is an official record of our company. It is a duplicate of the other one, a subscriber's copy, and the other is an office copy. It is our office stub. I have papers showing against whom charges were made for the telephone at that place effective March 21, 1923, to the period of October 20, 1924. The card on the top is a part of the same instrument. It is a confirmation.

Mr. GILLIS.—I now offer these instruments, which are four sheets and a postal card, and ask that they be marked Government's exhibit next in order.

Mr. O'CONNOR.—As far as the defendant Mahoney is concerned, I object on the ground it is immaterial, irrelevant and incompetent [204] and no foundation laid for the introduction of it in evidence.

Mr. SMITH.—The same objection as to the defendants Birdsall and Marron.

(Testimony of Edward T. O'Donnell.)

Mr. O'CONNOR.—I further object as to the defendant Mahoney on the ground that it is hearsay and not binding on him.

Mr. SMITH.—The same objection as to the defendants Birdsall and Marron.

The COURT.—The objection is overruled.

Mr. O'CONNOR.—Exception.

Mr. SMITH.—Exception.

(Thereupon the document was here introduced in evidence and marked "U. S. Exhibit 20.")

Said exhibit was and is in the following words and figures:

(Here insert exhibit.)

(The attention of the witness was here directed to U. S. Exhibit 14 for Identification.)

Q. I now show you Government's Exhibit 14 for for identification, and ask you if you recognize that, Mr. O'Donnell?

A. Yes, that is the payment of a bill.

Mr. SMITH.—I will ask that that go out, that it is payment of a bill, that it is not responsive. The question was, do you recognize it?

The COURT.—Well, let it go out. You can answer that "Yes" or "No."

A. Yes.

Mr. GILLIS.—What is it?

A. A payment of the telephone bill. [205]

Mr. SMITH.—That is objected to on the ground that the instrument will speak for itself.

The COURT.—Overruled.

Mr. SMITH.—Note an exception.

(Testimony of Edward T. O'Donnell.)

WITNESS.—(Continuing.) It is a telephone bill payment. Not exactly one of the regular telephone company bills. It is a duplicate issued in case the original was lost. It is a bill from the telephone company. It is one of the telephone company's regular instruments that they send out.

Mr. GILLIS.—I would ask that it be introduced in evidence and marked "Government's Exhibit 14."

Mr. SMITH.—Objected to on the ground it is immaterial, irrelevant and incompetent, hearsay, no proper foundation has been laid.

The COURT.—Overruled.

Mr. SMITH.—Exception.

(The document was thereupon introduced in evidence and marked "U. S. Exhibit 14.")

Said exhibit was and is in the following words and figures:

(Here insert exhibit.)

(R. Tr., pp. 131–135.) [206]

TESTIMONY OF C. W. BELL, FOR THE GOVERNMENT.

C. W. BELL, a witness called for the United States and sworn, testified as follows:

Direct Examination.

(By Mr. GILLIS.)

I am assistant vice-president of the Bank of Italy and was in charge of the Polk and Van Ness branch

(Testimony of C. W. Bell.)

up to December 10th of 1924. I was in charge there from about April 23d to December, 1924.

(The attention of the witness was then directed to a sheet of paper.)

Q. I show you a sheet of paper and ask you to look at it, without comment first. I ask you if that is an official record of the Bank of Italy.

A. Yes, it is the ledger sheet of the account of Brand & Marron.

Q. Just answer the question, is it an official record of the Bank of Italy? A. Yes.

Mr. SMITH.—I ask that the other answer go out.

The COURT.—Let it remain in.

Mr. SMITH.—Note an exception.

Mr. GILLIS.—I ask that this be introduced in evidence and marked Government's exhibit next in order.

Mr. SMITH.—To which we object on the ground it is immaterial, irrelevant and incompetent, no foundation has been laid for its introduction; furthermore, that the introduction of that instrument violates the Constitutional guarantee of the defendant Marron.

The COURT.—In what respect?

Mr. SMITH.—It is compelling him to be the unwilling source of information against himself. [207]

The COURT.—That is a new one. Overruled.

Mr. SMITH.—Note an exception.

(The document was here introduced in evidence and marked "U. S. Exhibit 21.")

(Testimony of C. W. Bell.)

Said exhibit was and is in the following words and figures:

(Here insert exhibit.)

WITNESS.—(Continuing.) I can tell from the record the length of time that the joint account was kept at the bank. The account was opened on September 4, 1923, and was closed on November 14th of the same year.

Mr. GILLIS.—Q. Calling your attention, Mr. Bell, to the heavy typing at the top of the page, "Two signatures required," what does that signify?

Mr. SMITH.—To which we will object on the ground that it is immaterial, irrelevant and incompetent, and no bearing upon the issues in this case.

The COURT.—Overruled.

Mr. SMITH.—Exception.

WITNESS.—(Continuing.) Those are the instructions to the bookkeeper that both signatures are required to draw against the account. The signature of Marron and Brand.

Mr. SMITH.—I will ask that the entire testimony be stricken from the record on the ground that it is immaterial, irrelevant and incompetent.

The COURT.—Motion denied. [208]

Mr. SMITH.—That the testimony does not show that the defendants, or any of the defendants in this action, are in any way connected with this account.

The COURT.—Motion denied.

Mr. SMITH.—Note an exception.

(R. Tr. pp. 135–137.)

TESTIMONY OF A. A. HICKS, FOR THE GOVERNMENT.

A. A. HICKS, a witness called for the United States and sworn, testified as follows:

Direct Examination.

(By Mr. GILLIS.)

I am a police officer of the City and County of San Francisco and was such in August, 1924. I was present at 3047 California Street in this city on that date.

Q. Will you just state what you did when you went there?

Mr. SMITH.—We will object to that on the ground it is immaterial, irrelevant and incompetent, no proper foundation has been laid.

The COURT.—Overruled.

Mr. SMITH.—Note an exception.

The COURT.—You may answer.

WITNESS.—(Continuing.) I visited 3047 California Street on the morning of the seizure about nine o'clock. I saw an automobile standing across the street from 3047 California Street and after I had passed that block that machine drew into a garage and I walked back again and shortly after that machine came out of the garage and proceeded east on California Street, and in the [209] machine there was a man driving in company with Marron. I went back to where the automobile came from. The appearance of the automobile to me

(Testimony of A. A. Hicks.)

looked as though it had liquor in it. There were cases piled up in it.

Mr. SMITH.—We will ask that that go out as purely an opinion.

The COURT.—The motion is denied.

Q. What kind of cases were piled up in it?

A. My judgment was that it was liquor.

Mr. SMITH.—We will ask that that go out, "my judgment was."

The COURT.—Motion denied.

Mr. SMITH.—Note an exception to both rulings.

WITNESS.—(Continuing.) I went back to 3047 California Street. The basement was locked, the garage door, and I could smell liquor coming from the garage. I immediately went to the Western Addition Police Station and notified my captain, Captain Coulter, of what I had found. He detailed Officer Olivera with me to go up there and make a sanitary inspection and report back to him our findings. We proceeded back to 3047 California Street, rang the doorbell, and the owner, Captain Curran, admitted us, that is, his wife did, and we met him in the house, and we told him what we were there for; we made a sanitary inspection of the premises, and proceeded downstairs to the garage; he said he did not have a key to the garage, the garage was locked, and I asked him who had the garage, and he said Eddie Marron. And I said, "Where is he?" And he said, "I can get him." I said, "Have you got a key to the garage?" And he said, "No." I said, "How long

(Testimony of A. A. Hicks.)

have you had this garage?'' And he said, ''For several months.'' I said, ''What is there in the garage?''

Mr. SMITH.—I ask that all this testimony with reference to who had the garage be stricken out on the ground it is hearsay [210] and not binding on the defendant Eddie Marron, he not being present.

Mr. GILLIS.—The testimony has come in without objection.

The COURT.—I do not think that is a good answer, Mr. Gillis, because the witness was making a long and detailed answer to a rather general question.

Mr. SMITH.—In order to make an objection to that question I would have to be a mind reader.

Mr. GILLIS.—I further make the suggestion, it is similar to the situation yesterday.

The COURT.—Yes, the evidence is clearly admissible, because it is some evidence from which the jury may conclude that this man was a co-conspirator with Mr. Marron; the motion is denied. You may go ahead.

Mr. SMITH.—We will note an exception, and object further on the ground the proper foundation has not been laid. There is no evidence here that Captain Curran was a co-conspirator.

The COURT.—There was some evidence. He testified that he rented this place to Mr. Marron, and that he had reason to believe that it was being

(Testimony of A. A. Hicks.)

used for the storage of liquor, and, of course, if that was so he would be a co-conspirator.

Mr. SMITH.—As I recall the testimony, may it please the Court, not that I want to prolong the argument, but as I recall the testimony, when he was asked if he knew what was in there he said no.

The COURT.—He said he suspected there was liquor there.

Mr. SMITH.—My recollection is different from that of the Court. I urge my objection on the grounds already given.

The COURT.—Motion denied.

Mr. SMITH.—Exception. [211]

A. I asked him what was in the garage, and he said, "You know what is in there?" and I said, "No, I don't know what is in there." "Well," he said, "it is stored with liquor." I said, "Who owns the liquor?" And he said, "Marron." I said, "I will see about that later." So I said, "There is no way of getting in, and you have no way of getting in?" And he said, "No; there is only the one door, and that is locked, and I have not the key." So I then asked my partner, Mr. Olivera, to proceed to the station and report back what we had found to Captain Coulter, which he did.

A. Officer Olivera returned and said that he had.

Mr. SMITH.—I ask that that all go out, whatever he said.

The COURT.—It is pretty difficult for a man to tell just exactly what happened without stating what was said. I presume that is not evidence.

(Testimony of A. A. Hicks.)

It may go out. Just tell us what you and Mr. Olivera did, and what other people did there, without reference to what was said, other than what was said by this Captain Curran.

A. Your Honor, I am trying to tell you and the gentlemen of the jury what my actions were in the case; I have not any object in saying anything that is not exactly proper.

Q. Try and do that without giving anything that was said, if you can.

A. Well, in due time the officers from the Prohibition Department arrived on the scene. About that time Captain Coulter arrived, and I then told him what had occurred, what I had found, what I suspected, and he asked if the owner of the premises was there, and I said, "Yes," so Captain Coulter in company with me and Officer Olivera proceeded to the house, rang the bell, which was opened by Captain Curran, and the captain said he wished personally to make a sanitary inspection, and we went through the premises, and then downstairs and into the alleyway. In the meantime Marron had arrived on the scene, and went into the house, and there is an alleyway alongside of the house, which was locked, [212] and there is a grating or lattice work on that door that gives you a view down the alleyway, and we saw them take a hammer and tools of some kind and tore out the side of the garage, Marron and Captain Curran, and I saw them carrying packages out of the garage and down into the rear of the yard, Marron and

(Testimony of A. A. Hicks.)

Captain Curran; and shortly after that the prohibition agents arrived—Captain Coulter and they both arrived about the same time. Then we proceeded into the house and down the alleyway to where this entrance had been made into the garage, and there we saw the liquor that was later seized, and we asked Captain Curran to unlock the door; there was a lock on the side of the door, and he got the key and unlocked the door, and we went out on the sidewalk and told the prohibition officers that the basement was full of liquor; Mr. Shurtleff and several other prohibition officers then came in and took charge. Mr. Shurtleff and one of the drivers of the machine took Captain Curran away, presumably to his office, and Officer Olivera and I were left in charge until the trucks arrived and carried the liquor away.

The COURT.—What became of Mr. Marron?

A. He disappeared. I don't know what became of him; he did not go out the front way; I guess he went out the back way. There were gunny-sacks, and later on we found those gunny-sacks full of Scotch whiskey in a drygoods box in the chicken-yard in the rear of the house; I think the box was nearly full; I think there was a dozen or fifteen sacks. The last I saw of defendant Marron was just prior to the arrival of the officers. That was in the alleyway behind this locked gate. He was carrying sacks of liquor to the rear of the house. I was present at 2922 Sacramento Street on September 3d.

(Testimony of A. A. Hicks.)

Q. What did you see there, Officer, without giving any conversation with any individuals at that place? What time did you get there? [213]

Mr. SMITH.—Before the witness answers that question, may it please the Court, I am going to ask that all of the testimony theretofore given with reference to what transpired at 3047 California Street be stricken from the record, and the jury instructed to disregard it, upon the ground that the entry, as made, manifestly was unlawful, that the officers did not enter, that is, the police officers did not make the seizure—the entry was made by the Federal Prohibition Department, and that their entry was unlawful in that they had no warrant; that there has been no foundation laid for the introduction of this testimony as against anyone in this conspiracy.

The COURT.—The motion is denied.

Mr. SMITH.—Note an exception.

WITNESS.—(Continuing.) I got there shortly after eight o'clock. I just have forgotten. I have the notation here of the date, approximately eight o'clock on September 3d. I had reported to Captain Coulter information given me the evening prior, and the following morning Captain Coulter said to me to proceed to this 2922 Sacramento Street.

Mr. SMITH.—We will ask that that all go out as hearsay and incompetent.

The COURT.—Denied.

Mr. SMITH.—Note an exception.

(Testimony of A. A. Hicks.)

WITNESS.—(Continuing.) And make a sanitary inspection and report to him our findings. I went to that address and after waiting a while I was admitted by Herman Baum, the man who lived there. He invited me to come in with Corporal Clark. We made a sanitary inspection of the building, the yard, and then we proceeded to the basement. As soon as we got into the basement I asked him whose liquor this was. I said, "What is this here?" He said, "Liquor." I said, "Who does it belong to?" He said, "It does not belong to me, it belongs to Eddie Marron." I said, [214] "How long has it been here?" He said, "I don't know, I have just rented the basement to him." I then notified Captain Coulter of my findings, and he in turn notified the prohibition officers, and in due time they arrived.

Mr. SMITH.—May it please the Court, at this time I am going to move that the entire testimony with reference to what was said by Mr. Baum be stricken out as pure hearsay, and the jury be instructed to disregard it, and I ask that the witness refrain from giving any hearsay testimony at all.

The COURT.—I do not think that is hearsay testimony at all. If a man rents his place for the storage of liquor, he is a co-conspirator with the one who stores it there, clearly, and his statements during the progress of the conspiracy of the storing of the liquor are admissible. The motion is denied.

(Testimony of A. A. Hicks.)

Mr. SMITH.—Has there been any testimony here that Baum rented this place to anyone?

The COURT.—That is what he testified to now. I am clear on it. The motion is denied.

Mr. SMITH.—Exception.

Mr. O'CONNOR.—Exception as to the defendant Mahoney, too.

The COURT.—Yes.

Mr. SMITH.—Baum is not charged here as a defendant, no testimony could be received as against Baum in this proceeding.

The COURT.—The motion is denied. Go ahead.

Mr. GILLIS.—Q. The liquor was then taken by the prohibition agents? A. Yes.

Q. At that place? A. At that address.

Cross-examination.

(By Mr. SMITH.)

I had no reason to believe, whatsoever, that a sanitary [215] inspection was necessary or that any one of the health ordinances was being violated at either one of these addresses. I was acting under orders of my superior. It was simply a subterfuge to gain entrance to the premises, if you wish to call it that. I did not have a search-warrant. I did not seize liquor. Whatever was done there with respect to the seizure of the liquor was done by the prohibition officers. I never took any of the liquor into my own custody. The prohibition officers, to my knowledge, did not have a search-warrant.

(R. Tr. pp. 137–146.)

TESTIMONY OF HERMAN BAUM, FOR THE GOVERNMENT.

HERMAN BAUM, a witness called for the United States and sworn, testified as follows:

Direct Examination.

(By Mr. GILLIS.)

I reside at 2922 Sacramento Street. I have lived there for about thirty years. About July, 1924, I rented a portion of my basement. I do not know exactly the date—about July, 1924. I rented it to Mr. Marron, Eddie Marron, one of the defendants in this case. He paid me $50 a month rent for it. That for just a portion of it. I did not know at the time what he used it for when he rented it. He kept it about four months, four and a half months, three and a half months—something like that.

Q. Did he ever give you any boxes to burn for kindling or for fire?

Mr. SMITH.—We will object to that on the ground it is immaterial, irrelevant and incompetent, leading and suggestive.

The COURT.—Overruled. [216]

Mr. SMITH.—Exception.

WITNESS.—(Continuing.) There were boxes left behind sometimes, yes, just ordinary boxes.

Q. Did they have any printing on them?

A. I do not remember.

Mr. SMITH.—We object to the entire line of

(Testimony of Herman Baum.)

examination on the ground it is leading and suggestive, immaterial, irrelevant and incompetent.

The COURT.—Overruled.

Mr. SMITH.—Exception.

A. I don't remember.

WITNESS.—(Continuing.) I could not tell you whether I saw any printing on any of these boxes. I have known Mr. Marron for about twenty-five years. During that time he was there I saw him about once or twice, and I thought perhaps there might be something like liquor in there. What the nature of it was I could not tell you. I never tasted any of it.

Cross-examination.

(By Mr. SMITH.)

I was a witness before the Federal Grand Jury at the time this matter was presented. I signed a piece of paper there, simply a statement that I rented it to Mr. Marron and received $50 a month for it. As far as I can remember the exact wording, I could not tell you. I did not sign any waiver of immunity. I did not rent the basement to Mr. Marron for the purpose of storing liquor there. He just asked me if he could rent it. There was a bed in that room.

Mr. SMITH.—Now, may it please the Court, I will ask that all of the testimony given by this witness be stricken from the record on the ground it is immaterial, irrelevant and incompetent, and there has been no testimony adduced here to show

(Testimony of William Glynn.)

that the defendant knew anything about what was going on there. [217]

The COURT.—Motion denied.

Mr. SMITH.—Note an exception.

Mr. O'CONNOR.—The same exception as to the defendant Mahoney, if your Honor please.

The COURT.—Yes.

Mr. GILLIS.—Q. Mr. Baum, did anybody promise you any immunity? A. No.

Mr. GILLIS.—That is all.

Mr. SMITH.—I would like to renew the motion heretofore made with reference to the testimony of Officer Hicks with reference to 2922 Sacramento Street, on the grounds heretofore urged, that it is not shown that Baum was a co-conspirator, or knew what was going on at that place, and on the ground it is all hearsay.

The COURT.—Motion denied.

Mr. SMITH.—Note an exception.

(R. Tr. pp. 146–148.)

TESTIMONY OF WILLIAM GLYNN, FOR THE GOVERNMENT.

WILLIAM GLYNN, a witness called for the United States and sworn, testified as follows:

Direct Examination.

(By Mr. GILLIS.)

I am a Federal Prohibition Agent with the Government and I have been such for the past seventeen months. I was present at 3047 Cali-

(Testimony of William Glynn.)

fornia Street on August 26, 1924. When I arrived there I saw Police Officers Olivera, Hicks and Captain Coulter. We went there in response to a telephone to seize some liquor that they found there on a sanitary inspection, they told us. We seized some at that time. I have a list of that which we seized at that time. [218]

Mr. SMITH.—May it please the Court, I wish to urge the same objection to all of this testimony that I have heretofore urged respecting the seizure at 3047 California Street.

The COURT.—Overruled.

Mr. SMITH.—Note an exception.

WITNESS.—(Continuing.) The liquor that we seized was in the basement or garage, as you call it, under the house at 3047 California Street. It was pointed out to me by Officer Hicks. At that time the door was closed. We could see it through the crack. A person upstairs by the name of Curran opened the door. Then we took possession of the liquor and removed it to the Subtreasury Warehouse.

(The attention of the witness was here directed to bottle No. 27569.)

WITNESS.—(Continuing.) I remember that bottle. It was one seized at that time and at that place. We seized 398 sacks of Cascade beer, 7 sacks, part full, of whiskey, 3 cases of champagne, 2 barrels of wine, 2 barrels of brandy, part full, 1 barrel wine, part full, one 50-gallon tank part full of alcohol, 11 cases whiskey, 3 cases of cham-

(Testimony of William Glynn.)

pagne, 21 sacks whiskey, one 5-gallon jug part full of wine, two 20-gallon copper stills. The bottle No. 27569 was seized at that time and at that place and was delivered to the chemist.

(The bottle was here marked "U. S. Exhibit 22 for Identification.")

(The attention of the witness was here called to bottle No. 26733A, which was marked "U. S. Exhibit 23 for Identification.")

WITNESS.—(Continuing.) This bottle was seized by me at the time and was delivered to the chemist. [219]

(The attention of the witness was here called to bottle No. 26733, which bottle was marked "U. S. Exhibit 24 for Identification.")

WITNESS.—(Continuing.) That bottle was seized at the same time and place and was delivered to the chemist. I was present at 2922 Sacramento Street on September 23, 1924. At that place I saw Police Officers Hicks and Olivera and Corporal Brown—I think his name is Corporal Brown. I seized liquor at that time in the basement under the house at 2922 Sacramento Street.

Mr. SMITH.—May it please the Court, at this time I would like to urge that all the testimony with reference to what occurred at 2922 Sacramento Street be excluded for the reasons I have urged before with respect to the seizure at that address.

The COURT.—Motion denied.

Mr. SMITH.—Exception.

(Testimony of William Glynn.)

Mr. O'CONNOR.—The same objection on behalf of the defendant Mahoney.

The COURT.—The same ruling.

Mr. O'CONNOR.—Exception.

WITNESS.—(Continuing.) The door was open when we got there, in the rear, and that is how we gained access to the garage. We went in the rear or side door. At that time Mr. Baum was in there and a corporal of the police. We went there on a telephone from the Police Department. We seized 10½ cases of whiskey, or 128 bottles, 2 cases of champagne, 10 sacks of gin, 12 bottles each, 1 case of gin, 12 bottles, 1 case of Scotch whiskey, 12 bottles each, 1 one-fifth gallon bottle of jackass whiskey, 8 one-fifth gallon bottles of rum, 3 bottles of cognac. We took that to the Government warehouse.

(The attention of the witness was then called to bottle No. 26789.) [220]

WITNESS.—(Continuing.) I remember that bottle. That was seized at that time and place and was later delivered to the U. S. chemist.

(Thereupon bottle No. 26789 was introduced in evidence for Identification as "U. S. Exhibit 25.")

(The attention of the witness was then directed to bottle No. 26790.)

WITNESS.—(Continuing.) I recognize that. I seen the labels written at that time. It was seized at that time and place and later delivered to the United States customs.

(Testimony of William Glynn.)

(Thereupon bottle No. 26790 was introduced in evidence as "U. S. Exhibit 26 for Identification.")

(The attention of the witness was then directed to bottle No. 26791.)

WITNESS.—I recognize that bottle. It was seized at that time and place and later delivered to the United States chemist.

(Thereupon bottle No. 26791 was introduced in evidence as "U. S. Exhibit 27 for Identification.")

(The attention of the witness was then directed to bottle No. 26792.)

WITNESS.—I recognize that bottle. It was seized at the same time and place and later delivered to the United States chemist.

(Thereupon bottle No. 26792 was introduced in evidence as "U. S. Exhibit 28 for Identification.")

(The attention of the witness was then directed to bottle No. 26793.)

WITNESS.—I recognize that bottle. It was seized at the same time and place and delivered to the United States chemist.

(Thereupon bottle No. 26793 was introduced in evidence and marked "U. S. Exhibit 29 for Identification.")

(The attention of the witness was then directed to bottle [221] No. 26734.)

WITNESS.—I recognize that bottle. It was seized at the same time and place and delivered to the United States chemist.

(Thereupon bottle No. 26734 was introduced in evidence as "U. S. Exhibit 30 for Identification.")

(Testimony of William Glynn.)

Cross-examination.

(By Mr. SMITH.)

I did not personally deliver these bottles to the chemist. Their regular system is what I am going by. I have no independent knowledge.

Mr. SMITH.—I will ask that all of the testimony with respect to the delivery to the chemist be stricken from the record.

The COURT.—You know that these are the bottles that were seized at these two places?

A. Yes.

Q. They were marked there in your presence?

A. Yes, I seen them marked, the labels written.

The COURT.—I suppose you expect to produce the chemist, do you?

Mr. GILLIS.—I do, yes.

The COURT.—I think that may go out.

WITNESS.—(Continuing.) That is not my label at all on the bottle. It is the regular label of the Government, not the regular label of the chemist. The one that we carry with us all the time for evidence, stickers. I did not affix these labels to any of them. I have not seized a great many bottles at different places that resemble these during my seventeen months of service. I never seized any champagne at any place than these two places. I never seized any Pebbleford whiskey except at that place. *We* respect to the other bottles, there are a great many bottles that are similar to the others. I saw the bottles labeled and the [222] labels put on them by an agent. Agent Rinckel was

(Testimony of William Glynn.)

the agent who put the labels on them. He was there. Agent Shurtleff and myself were at Sacramento Street. All of these bottles were not taken from California Street. I have not my list of what was taken from California Street. I have not seized Pebbleford whiskey or champagne before in any raid that I have been on. I took the Pebbleford from both places of Marron, on Sacramento and California Streets, both. I could identify whether the bottle came from Sacramento Street or California Street if I saw the label. Agent Shurtleff and the police officers were with me on the California Street raid. On the Sacramento Street raid there was Rinckel, Whittier and Eldredge and the police officers. I did not deliver these to the chemist myself. I simply followed what was the usual course. I have not seen the chemist's label. I only know by our own label. I do not know what the chemist's label is. I do not know by looking at the label that that has been to the chemist. My answer would be the same with respect to each of these bottles. I do not know whether it has been submitted to the chemist or not. It has been submitted, but I do not know whether it ever got there or not. I do not know whether it got there or not and was analyzed. I could not testify to that. The chemist will have to do that. By submitted I mean our usual way is to take this evidence and label it with internal revenue labels, the agents' names, the date of the investigation, and submit it in the usual way; sometimes from

(Testimony of William Glynn.)

our own office other agents besides the ones that seize it take it over. I do not know what officers made the seizure on California Street. It was not one of the prohibition agents. It was one of the police officers. Hicks and Olivera were there together. If I was told that police officers testified that prohibition agents made the seizure, my testimony would not be any different. They had already seized it and turned it over to [223] us. The police officers seized the liquor and turned it over to us when we got there. They told us it was there and the basement full of it. I mean that they were there when I got there, and they told me it was there and I went in and took it out.

Redirect Examination.

(By Mr. GILLIS.)

All of the labels were made out and put on the bottles in my presence.

(R. Tr. pp. 148–157.)

TESTIMONY OF CHARLES D. O'CONNOR, FOR THE GOVERNMENT.

CHARLES D. O'CONNOR, a witness called for the United States and sworn, testified as follows:

Direct Examination.

(By Mr. GILLIS.)

I am a notary public and have been such for pretty near 20 years in San Francisco.

(The attention of the witness was then directed to U. S. Exhibit 18.)

(Testimony of Charles D. O'Connor.)

WITNESS.—I recognize that instrument. That is my signature at the bottom as a notary public. I administered the oath to Mr. Marron. I know Mr. Marron. He is the defendant in this action.

(R. Tr. p. 157.)

TESTIMONY OF WALTER W. MENNE, FOR THE GOVERNMENT.

WALTER W. MENNE, a witness called for the United States and [224] sworn, testified as follows:

Direct Examination.

(By Mr. GILLIS.)

I reside at 339 San Juan Avenue, San Francisco. On July 26, 1924, I occupied the position of deputy registrar of voters.

(The attention of the witness was then directed to a document.)

WITNESS.—(Continuing.) I recognize this as an affidavit. That is my signature at the bottom. I took the affidavit of registration.

Mr. GILLIS.—I now ask that that be admitted in evidence and marked as a Government exhibit.

The COURT.—That is only for the purpose of an exemplar of the handwriting?

Mr. GILLIS.—It is.

Mr. SMITH.—To which we will object on the ground it is immaterial, irrelevant and incompetent, no proper foundation has been laid, nothing to show that the handwriting there is in any way connected

(Testimony of Sidney Franklin.)

with the handwriting of any of the defendants, or that it purports to be the handwriting of them.

The COURT.—Who is it signed by?

Mr. GILLIS.—George L. Birdsall. I will ask a further question. Q. Is this an official record of the Registrar's office? A. Yes.

Mr. GILLIS.—I now renew the application to admit it in evidence.

The COURT.—Overruled.

Mr. SMITH.—I make the same objection and note an exception.

(Thereupon the document was introduced in evidence and marked "U. S. Exhibit 31.")

Said exhibit was and is in the following words and figures:

(Here insert exhibit.)

(R. Tr. pp. 157–158.) [225]

TESTIMONY OF SIDNEY FRANKLIN, FOR THE GOVERNMENT.

SIDNEY FRANKLIN, a witness called for the United States and sworn, testified as follows:

Direct Examination.

(By Mr. GILLIS.)

On January 14, 1924, I was a deputy in the Registrar's office in the City and County of San Francisco.

(The attention of the witness was then directed to a document.)

(Testimony of Sidney Franklin.)

WITNESS.—(Continuing.) I recognize this instrument. That is my signature at the bottom. It is an affidavit of registration. I took the affidavit of Joseph E. Marron.

Mr. GILLIS.—I now ask that that be introduced in evidence and marked.

Mr. SMITH.—I make the same objection we made before.

The COURT.—Is Joseph E. Marron the same person as Eddie Marron?

Mr. GILLIS.—Yes.

Mr. SMITH.—There is no evidence of that.

The COURT.—I mean, is that his name?

Mr. GILLIS.—He is charged in the indictment as Joseph E. Marron, *alias* Eddie Marron.

The COURT.—What did he answer was his true name?

Mr. SMITH.—It appears in the indictment as Joseph E. Marron.

The CLERK.—J. E. Marron.

The COURT.—The objection is overruled.

Mr. SMITH.—Note an exception. [226]

(Thereupon the document was introduced in evidence and marked "U. S. Exhibit 32.")

Said exhibit was and is in the following words and figures:

(Here insert exhibit.)

(R. Tr. pp. 158–159.)

TESTIMONY OF ALF OFTEDAL, FOR THE GOVERNMENT.

ALF OFTEDAL, a witness called for the United States and sworn, testified as follows:

Direct Examination.

(By Mr. GILLIS.)

I am a special agent for the Government, Bureau of Internal Revenue, United States Treasury Department, and have been such since September, 1921. I have been connected with the Government for the past twenty-one years. I saw the defendant Mahoney on October 11, 1924, in my office, 310 Grant Building. He was arrested on that day and was brought there by the deputy marshal. I had a conversation with him at that time, which conversation was taken down in writing. I have it with me.

Mr. SMITH.—We will object on behalf of the defendants Birdsall and Marron to the introduction of the testimony, upon the ground that it is not admissible against them, because this statement was made after the termination of the alleged conspiracy.

The COURT.—The objection of the defendant Mahoney will be overruled. The objection as to the defendants Marron and Birdsall [227] and Brand will be sustained. There is about to be read to you by Mr. Oftedal, the witness on the stand, gentlemen, a statement which Mr. Oftedal testifies was made by the defendant Mahoney. That state-

(Testimony of Alf Oftedal.)

ment having been made after the arrest of these men, and, therefore, after the termination of any conspiracy, if there was one, is admissible only as against Mahoney; therefore, this statement you are to consider only in connection with the defendant Mahoney, and are not to give it any weight whatsoever as to any of the other defendants. You may read it.

A. "Charles Mahoney, of San Francisco, California, makes answer to questions propounded to him by Alf Oftedal, Special Agent in Charge, Bureau of Internal Revenue, as follows:

"Q. The purpose of this interview, Mr. Mahoney, is to inquire as to your knowledge respecting certain violations of law committed at 1249 Polk Street in this city. You understand, do you not, that you are not being required to give any testimony regarding this matter, and that you may, at any time during this interview, decline to answer any question asked of you? Under these circumstances are you willing to proceed?

"A. Yes, sir.

"Q. Please relate the circumstances under which you first became associated with Eddie Marron at that place?

"A. Well, I was hired up there as bartender by George Birdsall. I could not state the date, I think in November or December, something like that, Birdsall was supposed to be running the place —Marron was selling out—that was my impression—I had heard them talking about selling out.

(Testimony of Alf Oftedal.)

"Q. Who, aside from Eddie Marron, Birdsall and yourself, operated that place up until the time of the raid of October 3d?

"A. I was off for a while in the month of February and they had another fellow there; I don't know what his name was, but I believe it was George Howard.

"Q. How long did you know George Birdsall prior to the time that [228] you accepted employment at that place?

"A. For a long while—years ago.

"Q. Was Birdsall the man who made you acquainted with Marron? A. Yes, sir.

"Q. During the time you were employed there serving drinks, were you paid by both Marron and Birdsall?

"A. Birdsall paid me every time. Sometimes I drew money on my salary.

"Q. About how frequently did Mr. Marron visit the place while you were there?

"A. Well, he was there quite often at first. He only just dropped in and went right out—never stayed around the place at all.

"Q. All three of you, at times, waited upon the customers at the place, did you not?

"A. I never saw C. M. Marron wait on anyone.

"Q. I now show you a note-book seized at 1249 Polk Street at the time of the raid October 3d. Will you just glance over this book and see if you don't recall having seen it at the place?

"A. No, I don't recall it. It must have been

(Testimony of Alf Oftedal.)

kept in the closet. I never paid any attention to their business at all. They told me they got that book out of the closet the day of the raid. I went up there and George said they took some books and stuff and when I said where were they, he said in the closet.

"Q. How frequently did you see Officer Kissane enter the building at 1249 Polk Street while you were employed there by Mr. Birdsall?

"A. I would not want to answer that question, because I don't know how many times. As near as I can recall it was twice. He may, of course, have been there at times when I was not there.

"Q. Will you give the approximate dates of those visits by Kissane?

"A. I could not say. I don't remember them.

"Q. There was a parlor up there, was there not, which contained a slot machine, together with other furniture? A. Yes, sir.

"Q. What kind of a slot machine was that?

"A. It was a four bit [229] machine. I am pretty sure it was a four bit machine.

"Q. Was it the practice whenever customers came to the place to show them to private rooms, or booths, so that these parties might have privacy?

"A. No, sir. They could go where they pleased. We had a regular flat but no privacy there at all —the place was wide open.

"Q. Who was employed there as janitor?

"A. I don't know his last name. Johnnie is all I know him as—an Italian fellow.

(Testimony of Alf Oftedal.)

"Q. Was he employed at the place during the entire time you were there?

"A. No, sir, I was doing general work for quite a while myself.

"Q. You knew about this trap-door, did you not, where this note-book we have referred to was concealed? A. Yes, sir.

"Q. Who had the combination or the key that allowed access to that door? A. Mr. Birdsall.

"Q. What was actually contained there?

"A. Champagne.

"Q. Anything besides champagne and this book?

"A. Well, I told you I never had the key to it, and if anyone wanted champagne I could not give it to them.

"Q. Where did you men obtain the lemons, seltzer water, ice and other articles of that nature that were purchased in connection with the business maintained at the place?

"A. The lemons we got downstairs in the fruit store; the seltzer from the San Francisco Seltzer Company, I think it is, and we got the ice from either the National or the Union—I think it was the National Ice Company.

"Q. This record and other evidence in hand shows that Colonel Bevins made frequent visits to the place and often became indebted on account of his purchases of liquor; that Marsh, Joseph Yager, Hutchison, Sullivan and Edwards also had transactions of that kind there. Do you remember those men?

(Testimony of Alf Oftedal.)

"A. I know two of them. That is, I know who they are—I don't know [230] the other names.

"Q. Who are the two you know?

"A. Marsh and Bevins. Bevins was there quite frequently. Marsh was not around lately.

"Q. Tell me how the deliveries of intoxicating liquors were made at that place?

"A. I guess they were mostly made at night. The stuff was always there for me in the morning.

"Q. What were your hours of duty?

"A. 9:00 o'clock until 4:00—something like that.

"Q. Did you see Walter Brand come to the place at times with liquors? A. No, I did not.

"Q. Had Walter Brand been there at any time to obtain liquors while you were there?

"A. He is not drinking. He came to the place very seldom—about twice within the last six or seven months. I know that he had the place before Marron took it over, sure.

"Q. What has been Chick Hawkins' connection with the place?

"A. I don't know Chick Hawkins. I heard that he had it before, I don't know that he had it.

"Q. Who brought whiskey to the place besides Vaughn? A. I don't know.

"Q. You knew that Vaughn was bringing it there from time to time?

"A. I could not say that I knew. I said it was brought in the night.

"Q. Are you sure now that you are talking frankly with us about this thing? A. Sure.

(Testimony of Alf Oftedal.)

"Q. What did you receive for your services there?

"A. Well, when I first started I think I received $35.00—I would not say positively. Then I think they gave me $50.00 and at last $60.00. I was drawing $60.00 a week at the time of the raid on October 3d.

"Q. It seems that the furnishings in that place were moved immediately following a raid on October 3d, and that Marron's truck removed the furniture. Were you there when this was done? [231]

"A. No, sir, I was not. I did not know it was gone. I have not been around there—I kept away from there.

"Q. Have you made any effort to communicate with any attorneys since you were placed under arrest?

"A. I spoke to the Marshal going over last night, and asked him if he would try to get in touch with my attorney?

"Q. And did you suggest who should be named as your attorney? A. Hughie Smith.

"Q. Did you ask the Marshal to see Hughie Smith?

"A. I asked him to try and get in touch with him; said to tell him I was in jail and I didn't want to stay in all night. I wanted to let my wife know where I was. The Marshal told me to-day he could not get in touch with him—I guess he was busy.

"I, Charles Mahoney, hereby certify that I have

(Testimony of Alf Oftedal.)

carefully examined this record of an interview in the office of the Intelligence Unit, Bureau of Internal Revenue, and further that my answers to the questions shown herein are, to the best of my knowledge and belief, the Truth and Nothing but the Truth, So Help Me God.

"CHAS. MAHONEY.

"Subscribed and sworn to before me this 11th day of October, 1924, at San Francisco, California.

"ALF OFTEDAL,

"Special Agent in Charge, Intelligence Unit."

WITNESS.—(Continuing.) This is the complete interview that I had with him at the time. Certain statements were made independent of the record, but this is in substance what he said while the stenographer was there. He told me independent of the record that police officers had come to the place from time to time, that Mr. Kissane and that a man named Birdsall, a brother to the defendant George Birdsall, who he said is a sergeant on the police force, also [232] came there, but when I questioned him with regard to that he said, "I don't want to say anything more; I want to stop now"; but he did not go into details as to what transpired when these different officers came there, and did not say that any police officers obtained any drinks there. He also mentioned Ward Marron, brother to—no, Sergeant O'Brien, related to Ward Marron, who had been there, but he did not say as to whether or not Sergeant O'Brien had received any liquor there.

(Testimony of Louis Olivier.)

(Thereupon there was read into the record on behalf of the Government, as part of the record in Record 15018, heretofore introduced in evidence, the following notation from the blotter of the Clerk's Office of the United States District Court, under date of May 23, 1924: "George Howard Fine, Case No. 15,018, Received cash $500.")

(R. Tr. pp. 159–178.)

TESTIMONY OF LOUIS OLIVIER, FOR THE GOVERNMENT.

LOUIS OLIVIER, a witness called for the United States and sworn, testified as follows:

Direct Examination.

(By Mr. GILLIS.)

I am a police officer of the City and County of San Francisco. I was present at 3047 California Street on August 26, 1924. At that time I saw the defendant Eddie Marron and had a conversation with him. Officer Hicks went to telephone and I was standing in front of the premises 3047 California Street. Marron drove up in an automobile and he said to me, "Why don't you arrest me?" I told him I could not, I was acting under orders from Officer Hicks. [233] "Well," he said, "if you will arrest me I will give you the $1,000." I said, "No." With that Marron drove away. Hicks then came and I told Hicks what Marron had said. That was the only conversation I had with him. About ten minutes later the Federal officials came.

(Testimony of Louis Olivier.)

Cross-examination.

(By Mr. SMITH.)

It is not a fact that Mr. Marron asked me for a search-warrant, and asked me if I had a search-warrant for the place. I am a cousin of Mr. Marron.

(R. Tr. pp. 178–180.)

TESTIMONY OF W. F. WHITTIER, FOR THE GOVERNMENT (RECALLED).

(By Mr. GILLIS.)

(The attention of the witness was here directed to some papers.)

WITNESS.—I recognize these papers. I got them in the serving-room, on the cash register, at 1249 Polk Street.

Mr. SMITH.—May it please the Court, I have so many times asked for the exclusion of all of this evidence that it is hardly necessary to repeat it, but so that the record may be clear, may the record show that we object to the introduction of all of this testimony and these records upon the grounds that I have heretofore urged with respect to the book and other papers seized as not having been described in the search-warrant?

The COURT.—The same ruling.

Mr. SMITH.—Note an exception.

To Mr. SMITH.—(Witness.) These papers were seized on October 2, 1924, all of these papers. We seized some on the 3d. I don't remember just what they were. They are attached here. [234]

(Testimony of John J. Casey.)

Mr. SMITH.—Are these papers that were seized on the 3d in evidence, Mr. Gillis?

Mr. GILLIS.—I don't know.

The COURT.—What difference would it make if they were seized on the 2d or 3d?

Mr. SMITH.—The 3d was the second raid.

Mr. GILLIS.—I ask that they be introduced in evidence as Government's Exhibit next in order.

Mr. SMITH.—To which we object.

The COURT.—Overruled.

Mr. SMITH.—Note an exception.

Mr. O'CONNER.—The same objection as to the defendant Mahoney.

The COURT.—Yes.

Mr. O'CONNOR.—Exception.

(Thereupon the document was introduced in evidence and marked U. S. Exhibit 33.)

Said document was and is in the following words and figures:

(Here insert document.)

(R. Tr., pp. 180, 181.) [235]

TESTIMONY OF JOHN J. CASEY, FOR THE GOVERNMENT.

JOHN J. CASEY, called on as a witness on behalf of the Government, being sworn testified as follows:

Direct Examination.

(By Mr. GILLIS.)

My name is John J. Casey; I am captain of police

(Testimony of John J. Casey.)

of the San Francisco police department; have been connected with the San Francisco police department for 20 years and 7 months. I know the defendant Gorham in this action and have known him for about 20 years. During the year 1924 he was assigned to the Bush Street District—that is the district over which I have charge—from about the 7th of March, 1924. The premises, 1249 Polk Street *Street* are in that district about half a block or about three-quarters of a block from the Bush Street station. I have known the defendant Kissane for about 20 years, during which time he has been a police officer. He was assigned to Polk and Larkin and Sutter to Broadway as a patrolman, and that assignment included 1249 Polk Street.

Mr. GILLIS.—I show you two sheets of paper and ask if you recognize them? A. Yes, sir.

Mr. GILLIS.—That is signed by Patrick Kissane, the defendant in this case, is it? A. Yes.

Mr. GILLIS.—And is what?

A. It is a miscellaneous report on an investigation on 1249 Polk Street.

Mr. GILLIS.—To whom?

A. It is addressed to me.

Mr. GILLIS.—From Captain Kissane?

A. From Officer Kissane.

Mr. GILLIS.—I mean from Officer Kissane.

A. Yes.

Mr. GILLIS.—You received that, did you?

A. No. That was received by Lieutenant Duffy, and, in turn, forwarded to me.

Mr. GILLIS.—I ask that that be introduced in evidence and marked Government's exhibit next in order. [236]

Mr. SMITH.—May I look at it first?

Mr. GILLIS.—Yes.

Mr. SMITH.—All right.

(The document was marked U. S. Exhibit 34.)

Mr. GILLIS.—I will read it to the jury:

"Police Department, City and County of San Francisco.

"Police District No. 5. Bush St. Station.

"San Francisco, Cal., Oct. 11th, 1924.

"Captain John J. Casey,

"Sir: I respectfully report the following:

"Subject: Report on 1249 Polk St.

"I have visited and officially inspected 1249 Polk St. about twice a week during the 8 to 4 watch for a year or more. I have never found any evidence of bootlegging being carried on there and saw no more than one or two persons in the place at any one time. I never saw any slot-machines there. I have made previous written reports stating that this place, 1249 Polk St. was suspected of bootlegging.

"PATRICK KISSANE,

"Police Officer, Star No. 80."

"Respectfully referred to the Chief of Police."

There is a notation at the bottom—will you read that for me, Captain?

A. "Rec'd by Duffy, Lieutenant, Star 607," it looks like.

(Testimony of John J. Casey.)

WITNESS.—(Continuing.) In October, if I remember correctly, around the first part of October, I spoke to Gorham about 1249 Polk Street and he told me that he had visited these premises sometime previously, and that he had been refused permission to search the place and that he had made an application for a search-warrant to Chief Bond and Warrant Clerk Golden, of the District Attorney's office, and Golden asked him if he had seen any violation of the law up there, any liquor sold, and Gorham told him that he had not, and I believe on [237] those grounds Golden refused to issue a search-warrant. Gorham said nothing about having gone to the premises with Kissane.

Q. I show you two sheets of paper and ask you if you recognize them? A. Yes.

Q. What is this that I hand you, Captain?

A. It is a miscellaneous report in reference to an investigation as to whether or not there were any slot machines ever observed in those premises.

Q. Made by whom? A. Sergeant Gorham.

Q. That is a defendant in this case? A. Yes.

Mr. GILLIS.—I ask that that be introduced in evidence and marked Government's exhibit next in order.

(The document was marked U. S. Exhibit 35.)

I will read it to the jury:

(Testimony of John J. Casey.)

"Police Department, City and County of San Francisco.

Police District No. 5. Bush St. Station.

San Francisco, Cal., Oct. 13, 1924.

Captain John J. Casey,

Sir: I respectfully report the following:

Subject: Conditions Observed at #1249 Polk St.

In compliance with your order of Oct. 12, 1924, relative to conditions observed by me and visits made to 1249 Polk St., I will state that about the latter part of March of this year, I visited this place to secure evidence of alleged bootlegging there and was refused admission to any of the rooms unless I had a warrant.

I again visited there several times about two months ago, to see Geo. Birdsall in connection with a burglary committed there.

On each of these visits I was received by George Birdsall at the head of the stairs in the hallway, the doors of all of the rooms were kept shut, and I could see no slot machines on the premises, nor could I observe whether or not there were any people in the place. [238]

JOSEPH H. GORHAM,

Sergeant of Police, Star No. 614.

"Received by Sergt. John M. Morrissey #386."

W I T N E S S.—(Continuing.) Some time in March, I received a complaint from the office of the Chief of Police that 1249 Polk Street was suspected of illegal selling of liquor. I received that complaint on March 26th or 27th, it was dated the 26th

(Testimony of John J. Casey.)

of March. Generally all of these complaints were received that way—I received them the day after they were dated and turned the complaint over to Sergeant Gorham. I instructed him to see if he could obtain any evidence on this place; it was probably around ten o'clock in the morning of March 27th that I turned this complaint over to Sergeant Gorham. After two or three days later, Sergeant Gorham told me he had gone to the place —that he had rung the bell there and got to the top of the stairs and met Birdsall, and Birdsall told him that he, Birdsall, lived there, and refused to allow him to go through the place. Gor*ha* then told me he went to the bond and warrant clerk's office and applied for a search-warrant, and Golden asked him if he had seen any liquor being sold or served on the premises, and he had told Golden that he had not. Thereupon, Golden refused to issue the warrant. I then took the complaint from Gorham and placed it on the clip for investigation by the sergeants and officers on the beat. That was practically the same conversation I had with him in October.

Some time in May or June, I could not state the exact date, a burglary had been committed at 1249 Polk Street and two men arrested, and the arresting officers appeared in court the following day. George Birdsall, I believe, was subpoenaed to appear as a complaining witness, but had refused to sign and swear to a complaint against them and the officers so reported to me. I instructed the of-

(Testimony of John J. Casey.)

ficers to obtain another subpoena for Birdsall or subpoena Birdsall, to appear in court, and for the arresting [239] officer to swear to the complaint, and put Birdsall on the stand, on the witness-stand. I do not remember that I talked to him about that after he had gone over to see Birdsall. I understand that this proceeding was complied with that Birdsall took the witness-stand and refused to prosecute. I do not at this time remember any other conversation with the defendant, Gorham, with respect to bootlegging investigation at 1249 Polk Street.

Officer Kissane took his vacation in 1924 from August 30 *th* September 13th, inclusive; his days off being August 29th and September 14th. On the seventh day of October, 1924, I had a conversation with the defendant Eddie Marron. I interviewed him about 10:30 A. M. with reference to items in the memorandum book that was kept at 1249 Polk Street. I asked Marron if he was interested in or the owner of the premises at 1249 Polk Street and he told me that he was not, that he had disposed of his interests to George Birdsall a year ago September, and that Birdsall was paying him in monthly installments. I asked him if he ever paid any money to police officers there in any manner, or for anything, and he denied it. He said he had never paid any money to the police, and also said that he had visited the premises at 1249 Polk Street at different occasions—he denied that he ever saw Officer Kissane on the premises. I re-

(Testimony of John J. Casey.)

quested him to write the name of Kissane on a piece of paper—he also refused to sign any statement. Sergeant Gorham was with me when I had this conversation with Mr. Marron.

Q. I show you two sheets of paper, Captain Casey, and ask you if you recognize those?

A. Yes.

Q. By whom was that made, Captain Casey?

A. Sergeant Gorham.

Q. What is it?

A. It is a miscellaneous report on an investigation in reference to illegal sale of liquor at 1249 Polk Street.

Q. Made to you? A. Yes. [240]

Q. And received in your office?

A. It was received by Sergeant Morrissey and then turned over to me.

Mr. GILLIS.—I ask*ed* that it be introduced in evidence and marked Government's exhibit next in order.

(The document was marked U. S. Exhibit 36.)

I will read it:

"Police Department, City and County of San Francisco.

Police District No. 5. Bush St. Station.

San Francisco, Cal., Apr. 1, 1924.

Captain John J. Casey.

Sir: I respectfully report the following:

Subject: Complaint from Chief's Office Mar. 26, 1924, that the premises #1249 Polk St. is a bootleg joint.

(Testimony of John J. Casey.)

In response to above complaint, will state that #1249 Polk St. is a flat occupied by Mr. Geo. Birdsall as his residence.

Birdsall refused me permission to enter the place, and I applied to Bond and Warrant Clerk Wm. Golden for a search-warrant which was refused, as I could not testify that liquor was sold to me there.

The conditions under which a search-warrant would be issued, i. e. that liquor was sold to me, or to someone who would testify to the sale, or that liquor was in view of me before entering the premises would be sufficient to authorize an arrest by me without authority of a warrant.

I had Officer Ward who is not known to Birdsall attempt to enter this place to purchase liquor, but he was likewise refused admittance.

I will give this complaint continued attention, and take proper police action, when circumstances warrant same.

This place has been suspected of being a blind pig, and reported accordingly.

JOSEPH H. GORHAM,
Sergeant of Police, Star No. 614." [241]
Rec. by Sergt. John M. Morrissey, #386.
Respectfully referred to the Chief of Police,
CAPTAIN JOHN J. CASEY."

Q. I show you two attached slips of paper and ask you if you recognize that, Captain Casey?

A. Yes.

Q. That is signed by whom?

(Testimony of John J. Casey.)

A. By Sergeant Gorham.

Q. And is what?

A. That is a miscellaneous report in answer to a communication from the Chief of Police as to how Sergeant Gorham knew that this was Birdsall's residence.

Mr. GILLIS.—I ask that this be introduced in evidence and marked Government's exhibit next in order.

The COURT.—What is the date of it?

Mr. GILLIS.—October 15, 1924.

The COURT.—Go ahead.

Mr. O'CONNOR.—That is subject to the objection that it is not binding on the defendant Mahoney.

The COURT.—Yes.

Mr. GILLIS.—I will read it:

"Police Department, City and County of San Francisco.

Police District No. 5. Bush St. Station.

San Francisco, Cal., Oct. 15, 1924.

Captain John J. Casey.

Sir: I respectfully report the following:

Subject: Premises at #1249 Polk St. whether or not residence of George Birdsall.

In answer to communication from Chief of Police Oct. 14, 1924, regarding a report made by me April 1, 1924, in which I described the flat at #1249 Polk St., I will state that I made that report in answer to a communication from the Chief of Police given

(Testimony of John J. Casey.)

me to investigate, the substance of which was that liquor was being sold there. [242]

I knew nothing about this place at the time I went there, nor had I any idea as to who occupied or operated the place at that time.

This place is a flat of six rooms on the upper floor of a two-story building.

When I rang the bell and was admitted I met George Birdsall at the head of the stairs in his shirt sleeves.

It was at this time, that Birdsall informed me that he lived there, and his appearance, and furnishings in one of the rooms the door of which was open, furnished as a living-room with a chesterfield set, caused me to believe his statement.

When I stated my business, he refused permission to search the place, as per my report of April 1, 1924.

George Birdsall, knows me as a policeman for the past twenty years.

JOSEPH H. GORHAM,
Sergeant of Police.

Respectfully referred to the Chief of Police.

CAPTAIN JOHN J. CASEY,
#1."

The COURT.—Q. Did you know, Captain, at that time, that this man Birdsall had appeared in this court and plead guilty to selling liquor at that place?

Mr. SMITH.—What was the date of that report?

The COURT.—May 15, 1924. The sale of the

(Testimony of John J. Casey.)

liquor shown by the information is May 15, 1924. Did you know that? A. I did not.

Mr. O'CONNOR.—That is objected to on the ground it is not binding on the defendant Mahoney, that any knowledge of Captain Casey would not be binding on the defendant Mahoney.

The COURT.—Overruled.

Mr. O'CONNOR.—Exception.

Mr. SMITH.—Before the Court puts the question, might I ask what date the captain is testifying as to? [243]

The COURT.—The last report was October.

Mr. GILLIS.—He referred to a prior report of April 1.

The COURT.—Q. But at that time, in October, or at any other time after the 24th of May, did you know that Mr. Birdsall had appeared in this court and plead guilty to a charge of selling liquor and maintaining a nuisance at that place?

A. I did not.

Q. When repeated complaints are made against a place, do you investigate the records of this court to determine—when you are several times refused search-warrants by the bond and warrant clerk, do you make an investigation of the records of this court to determine whether or not—

Mr. KELLY.—If your Honor please—

The COURT.—I have not finished my question yet—to determine whether or not there is any record here of sales of liquor in that place against which complaint is made? A. I never have, no.

(Testimony of John J. Casey.)

The COURT.—What is the objection?

Mr. KELLY.—No objection.

Mr. GILLIS.—Q. Did you know of your own knowledge, Captain Casey, that 1249 Polk Street was a suspected bootlegging joint?

Mr. O'CONNOR.—That question is objected to on the ground it is not binding on the defendant Mahoney.

Mr. KELLY.—Objected to as not binding on any of the defendants, including the defendant Gorham.

Mr. SMITH.—As a matter of fact, what his suspicions are is purely incompetent.

The COURT.—The question here is whether or not these two members of the police force in charge of, or having that particular section of the city in charge, were acting in good faith in making these reports. I think I will overrule the objection.

Mr. SMITH.—Exception.

Mr. O'CONNOR.—Exception. [244]

A. I had received reports from the officers patrolling that beat that it was suspected as a bootlegging place.

Mr. GILLIS.—Q. Had you received any report prior to May 1 from Chief O'Brien's office, with reference to 1249 Polk Street as being a suspected bootlegging joint?

Mr. O'CONNOR.—The question is objected to on the ground it is not binding on the defendant Mahoney.

(Testimony of John J. Casey.)

The COURT.—I think that is covered by the reports.

Mr. GILLIS.—Q. I am asking you, Captain, if you had received any information or reports from Chief O'Brien's office.

The COURT.—He may answer.

Mr. SMITH.—It is purely hearsay.

The COURT.—It is overruled.

Mr. SMITH.—Exception.

Mr. O'CONNOR.—Exception.

Mr. GILLIS.—I am asking if he received such a report.

The COURT.—You may answer.

A. I received a communication from the chief's office about March 26th, stating that information had come to the office that the premises at 1249 Polk Street were suspected of selling liquor.

Mr. O'CONNOR.—I will ask that the whole of the testimony of the captain go out on the ground it is hearsay and not binding on the defendant Mahoney.

Mr. SMITH.—The same motion with respect to the defendants Marron and Birdsall.

The COURT.—Denied.

Mr. O'CONNOR.—Note an exception.

Mr. SMITH.—Exception.

Mr. GILLIS.—Q. Did you know of your own knowledge that it was a suspected bootlegging joint prior to March 1?

Mr. O'CONNOR.—The same objection. [245]

Mr. SMITH.—The same objection.

(Testimony of John J. Casey.)

The COURT.—The same ruling.

Mr. SMITH.—Furthermore, calling for the opinion and conclusion of the witness, and furthermore we urge that his suspicion would not be competent evidence at any rate.

The COURT.—The same ruling. You may answer.

Mr. SMITH.—Exception.

Mr. O'CONNOR.—Exception.

A. Prior to March 1?

Mr. GILLIS.—1924, yes.

A. I don't think I did.

Q. Did you ever visit that place, Captain?

A. Around the first part of March, I would say that it was some time around the first week of March I did visit that place.

Q. What was your purpose in visiting the place?

Mr. SMITH.—We object to that on the ground his purpose is not binding on any of the defendants.

The COURT.—Overruled.

Mr. SMITH.—Exception.

Mr. O'CONNOR.—The same objection as to the defendant Mahoney.

The COURT.—The same ruiing.

Mr. O'CONNOR.—Exception.

A. Just about that time somebody had spoken to me, either around the station or in the vicinity—

Mr. GILLIS.—I do not want any hearsay evidence, nothing that they spoke to you. I want your purpose in going there.

A. Well, that is how I received the information

(Testimony of John J. Casey.)

that the place—I was told that it was a bootlegging place.

Mr. SMITH.—May that go out, that "I was told that it was a bootlegging place"?

The COURT.—Yes. You went there because you believed it was? [246]

A. Yes.

The COURT.—That is sufficient.

Mr. O'CONNOR.—At this time I ask that the remarks of the Court be assigned as misconduct, and the jury instructed to disregard them.

The COURT.—Note your exception.

Mr. O'CONNOR.—Exception.

The COURT.—Go ahead.

A. I was passing there, and rang the bell, and was admitted and went upstairs, and I met George Birdsall there.

Mr. GILLIS.—Q. Did you have a talk with him?

A. I said, "Hello, Birdsall, I did not know that you were here," or words to that effect.

Q. What did he say?

A. If I remember right, I said, "This place is supposed to be bootlegging," and he passed some remark about living there—he was living there—he said that he was not doing any bootlegging.

The witness continued: The premises, 1249 Polk St., are approximately thirty feet from the corner of Bush Street on the west side of the street and the Bush Street police station is in the middle of the block on Pine Street between Polk and Van Ness Avenue. When I went to the prem-

(Testimony of John J. Casey.)

ises at 1249 Polk Street I met Mr. Birdsall at the head of the stairs—that was some time around the first of March. I said something like, "Hello, Birdsall, I didn't know that you were here." And I said something about, "This place is reported to me as being a blind pig, that you are bootlegging here." Birdsall denied it—said he was not bootlegging, and I asked him what he was doing there—and he said he was living there. I walked in as far as the kitchen door, to the right of the head of the stairs, and I stood there in the kitchen door talking to him; I told him, I says, "If you are doing any bootlegging here you [247] might as well *naje* up your mind you have got to quit it," but he maintained he was not doing any bootlegging there. That was the extent of our conversation. He went before me towards the kitchen. As much as I could see there, there was a stove off there to the north side of the room, a sink over in the corner, a little cabinet alongside of the sink, and a couple of bottles on the drainboard of the sink. There were no dishes in sight, and the bottles I saw on the sink looked *that* the ordinary wine bottle, or any bottles; there might have been two or three, I could not say at this time. It was between four and five o'clock in the afternoon and it was sometime around the 2d or 3d of March—somewhere around there. This was the extent of my conversation with Mr. Birdsall. I have known Birdsall for perhaps twenty years, but had not seen him before this time for a couple of years. He did not

(Testimony of John J. Casey.)

invite me into the house and I do not believe I saw any of the other rooms. When I left the premises I told him that if he was bootlegging around there, he might as well quit it, for if we got a case on him we intended to lock him up. Sergeant Gorham came to my command about March 7th or 8th, shortly after this conversation with Birdsall. My general instructions to him at that time were that we wanted the situation in reference to bootlegging, prosecution, illegal gambling and narcotics cleaned up. I did not give him any instructions in regard to 1249 Polk Street. I received the communication from the Chief of Police around March 27th, at which time I gave him the complaint and told him to go and see what he could do with it. I did not visit these premises again after the arrests had been made in October. Sergeant Gorham was assigned to the Bush Street Police District at my request by the Chief of Police for the purpose of assisting me in police matters. Sergeant Gorham's duties on an assignment under my command were as follows: He was in charge [248] of a special detail in the district—his duties being to investigate specific complaints from the chief's office, of which I received a great many letters complaining about several places, gambling, prostitution, bootlegging and investigating petty larcenies, and lost property reports, and general police work throughout the district.

Q. On October 7th, did you have a conversation with the defendant Birdsall? A. Yes.

(Testimony of John J. Casey.)

Q. Will you tell us what that conversation was?

Mr. SMITH.—Objected to on the ground the proper foundation has not been laid.

Mr. O'CONNOR.—Objected to on behalf of the defendant Mahoney on the ground it is a statement made after the termination of the conspiracy, and not binding on him.

The COURT.—That was after Mr. Birdsall's arrest, was it?

Mr. O'CONNOR.—Mr. Gillis in his opening statement, said that this conspiracy was ended on October 3d.

The COURT.—Q. Do you know if it was after his arrest?

A. I believe Birdsall was arrested there on October 2d.

Q. October 2d? A. I think so.

Q. This conversation would be after that arrest?

A. October 7th.

The COURT.—It would be admissible against Birdsall, anyway. It is overruled to that extent.

Mr. O'CONNOR.—Exception.

Mr. SMITH.—Exception.

A. I interviewed Birdsall at 1:00 P. M. on October 2nd, and he said he had purchased the place from Eddie Marron one year ago, and was paying for the same in monthly installments. I questioned him about a book found upon the premises, and certain entries made in the book, and Birdsall stated that the items referring to Bell, Wendler, Colonel Bivens 10 and Kissane 5, 1/19/24, Kissane 5, April

(Testimony of John J. Casey.)

[249] 6 Kissane 5, that those were moneys that were loaned to patrons of the place. I questioned him as to whether the party Kissane mentioned in the book was officer Kissane, and he said that it was not. I questioned him on its items, Gift $90, $60, and August 11 $150, Gifts P. L. and he said that referred to stock which he had given away at various times, and in this manner he made the entries in the book. He claimed that that was the only way in which he could keep account. I asked him what the letters "P. L." referred to, and he said that referred to profit and loss; the items of February or March, "Police $100," May, between 22 and 23, May 26, Police $60, June 22, Police $15, June 4, Police $150, June 29, Police $5, and Birdsall said that that was money that he was paying the people to protect his stock in transporting the stock; it was paid to protect stock from hijackers. I asked him if these men that he was paying to protect his stock were in any way connected with the police department, and he claimed that they were not, that they were men that he employed for that purpose.

The COURT.—How did they get the stock into that place without the police in any manner knowing about it?

Mr. O'CONNOR.—That is objected to on the ground that it is immaterial, irrelevant and incompetent, and not binding upon the defendant Mahoney, and highly improper.

Mr. SMITH.—In addition to that it is calling for the opinion and conclusion of the witness.

(Testimony of John J. Casey.)

The COURT.—Overruled.

Mr. SMITH.—Exception.

Mr. O'CONNOR.—Exception. At this time I desire to assign the question as misconduct, and ask the Court to instruct the jury to disregard it.

The COURT.—Note your exception.

Mr. O'CONNOR.—Exception. [250]

Mr. SMITH.—May the same objection and request be made on behalf of the defendants Marron and Birdsall?

The COURT.—Yes. Answer the question.

A. There was never a time that a police officer was stationed directly in front of that place, that is, a blockade placed in front of it.

Q. Why didn't you do that when these reports were made from the chief's office, and other places, that this was a bootlegging joint?

A. I had hardly sufficient men to blockade any place out there. The district comprises from the east line of Steiners Street to the east line of Leavenworth, and the center line of Market to the north line of Broadway; the average number of men on patrol in that district at any time on the 8 to 12 watch would not be over 12 or 13, and on the 4 to 12 and 12 to 8 watches would be the same; so that if I stripped the streets to blockade one of these places I would be leaving these business districts without proper police protection, and there are several banks there, seven branch banks, something like 12 or 13 schools to look after, school children, so it would be practically impossible to establish a

(Testimony of John J. Casey.)

blockade in front of the places that were suspected of selling liquor, it would be stripping the rest of the district, we have several crossings to take care of, traffic to look out for.

WITNESS.—(Continuing.) The total number of men under my command at the present time is 103. At that particular time in 1924 there were probably from 99 to 101 men under my command, and there were two men under the command of Sergeant Gorham. The hours of watch of Kissane were from 8:00 A. M. to 4:00 P. M. and his beat was Polk and Larking from Sutter to Broadway, the premises at 1249 Polk Street, being included therein. [251]

Cross-examination.

(By Mr. TAAFFE.)

In my conversation with Birdsall after his arrest on the premises at 1249 Polk Street, Birdsall said that he had never paid any money to any member of the police department, and that on several occasions officers visited the premises and made search for liquor, but were unable to find any. I asked Birdsall to write the words "Police" and "Kissane," which he refused to do, and he also refused to sign any statement. That was about the extent of the conversation I had with him. After the complaint was received from the chief of police and was referred back to me by Sergeant Gorham. I instructed the sergeants and officers on the beat to investigate and report, and take proper action, and report the result of their investigation. As a result of this order, reports were filed with me. I

(Testimony of John J. Casey.)

have not these reports with me at this time. They were received by me and forwarded to the chief's office.

Whereupon, the Court ordered that the examination of the witness be deferred until two o'clock, so that reports referred to could be produced.

(Rep. Tr., Vol. 3, pp. 182 to 196½, inc., and Vol. 4, pp. 197 to 208, inc.)

TESTIMONY OF D. W. RINCKEL, FOR DEFENDANTS.

D. W. RINCKEL was called as a witness on behalf of the defendant, and being sworn testified:

Direct Examination.

(By Mr. GILLIS.)

My position is that of federal prohibition agent and I have been such for about five years.

Q. Were you present at 2031 Steiner Street on October 24, 1923? A. Yes.

Q. What did you see there?

Mr. SMITH.—Just a second: We will object to any testimony with reference to what occurred at 2031 Steiner Street on October 24, 1923, [252] for the reasons heretofore urged in the petition to suppress evidence and a plea in bar. The situation that arose, I believe, at the opening of this trial, with reference to another raid at 1249 Polk Street is identically this one, now, with reference to which the district attorney is attempting to elicit information. At 2031 Steiner Street an arrest was made

at the date given by the district attorney in the question, and Mr. Marron was arrested; thereafter, he came before this Court, entered a plea of guilty, judgment was imposed and judgment satisfied. He has been once in jeopardy as to any offense that he may have been guilty of as of that time, and we submit that any evidence that would be received at this time would be prejudical as to him, and would be tantamount to placing him in jeopardy a second time for a single offense.

The COURT.—Mr. Smith, does the conviction for an overt act bar prosecution for conspiracy?

Mr. SMITH.—In a matter reported, I believe, Goldstein vs. The People, or The People vs. Goldstein, I think it is, reported somewhere about as far back as 32 California, the rule was laid down and it has been followed in this court, followed quite recently by his Honor Judge Kerrigan, that where the same evidence was necessary in order to obtain a second conviction, the introduction of the evidence that has been introduced in the previous proceeding could not be introduced in the second, for the reason that the man has been once in jeopardy.

The COURT.—Of course, that is so, but a conspiracy charge such as this presupposes a long series of acts; if we could imagine a conspiracy which is followed by overt acts after overt acts, and some of the conspirators might have been arrested and charged and convicted or pleaded guilty to some of the overt acts, that would not in any wise affect a

prosecution for conspiracy. The Courts of Appeal throughout the country have held that on numerous occasions, [253] and to hold that the things that are done under a conspiracy are not admissible for the reason that some of the overt acts have resulted in arrests and convictions, it seems to me is contrary to the whole principal of the law of conspiracy. I will hear you, however, if you have anything further to offer on it.

Mr. SMITH.—Yes. I was present when the matter was argued by a learned counsel before the Circuit Court in the matter of Levin vs. The United States of America, that is on appeal at the present time. At that time, various authorities were offered to the Circuit Court and I have that brief. I do not see any necessity for going into the matter deeply at this time, but I will submit the brief.

The COURT.—I tried the Levin Case.

Mr. SMITH.—I know that you tried it.

The COURT.—They were not charged with conspiracy.

Mr. SMITH.—No, but the same proposition arose, they were charged with making a false return, and with perjury; it was contended by counsel in that case that one offense took in the other, and that both things occurred at the same time; the Income Tax Law provided that anyone who made a false return would be punishable in such and such a way, and then the Criminal Code of the United States defined perjury; it was contended by counsel that the two crimes were merged

into one crime by reason of the fact that one was denounced in the income tax law itself. In that indictment, which was set out in two counts, a conviction was had on both counts. Counsel in that case contended that a conviction of the first was a bar to the conviction on the second, because the defendants had been once in jeopardy. It is identical. on the same ground.

The COURT.—Even if that contention were correct, it has no application, even the remotest, to this situation, because if that is correct it would be upon the theory—I remember the cases were submitted at the time the case was tried, and again on the motion [254] by different counsel. on the motion for new trial. If that were so it would be upon the theory of those cases which hold that where the same state of facts constituted two specific crimes under the federal statute, a man could be prosecuted only on one, and a conviction under this state of facts of the one is a bar to the other. That is an entirely different thing from a conspiracy. While it is true that the statute, that is, Section 37 of the Criminal Code, provides that the Government, in order to establish a conspiracy, must show an overt act, still the Supreme Court and the various courts of appeal have time and again held that the overt act is not the essence of the charge; that the gist of the crime is the conspiracy, itself, and that the statute, in requiring an overt act simply provides, contrary to the common law of England, and contrary, indeed, to many of our own statutes, such as

the Sherman Act, in the United States, the Cartwright Act in California, where the mere gathering together and the meeting of minds and an agreement to do an illegal act is a crime, whether the legal thing be done or not—but that is not the provision of Section 37. Section 37 is that men might conspire with perfect freedom so long as they do not do anything as a result of the conspiracy; but the minute they do, then the essence, or gist, or real *corpus delicti* is the fact that they entered into the legal agreement; and, of course, it is elementary and fundamental, on a charge of conspracy, no conviction can be had of the specific acts, no matter how many or how heinous they may be; therefore, the Supreme Court has several times said that the the overt act is no part of the *corpus delicti*, but is rather evidence of the fact that the conspiracy was entered into and carried out. I think it is clear. I will overrule it.

Mr. SMITH.—There is just one further authority I would like to submit, the case of United States vs. Weiss, 293 Fed. 994, where the Court said: "At the threshold it must be noted that the [255] Government cannot split up one conspiracy into different indictments and prosecute all of them, but that prosecution for any part of a single crime bars any further prosecution based upon the whole or a part of the same crime." Then citing Murphy vs. U. S., 285 Fed. 804, at page 816; In re Snow, 120 U. S. 274.

The COURT.—That is absolutely true, there is no question about it, but that does not affect this situation in the least. Of course, if two or more men entered into a conspiracy and did an overt act —for instance, we had the Nan Patterson case here, where overt acts were committed both before and after the arrest, and if that defendant had been charged with a conspiracy resulting in the first overt act, and charged with the conspiracy resulting in the succeeding overt act, and she had been twice charged with the conspiracy, the evidence showing that the conspiracy was one continuing thing, of course she could not be convicted of both, for the very simple reason that I have pointed out, and that is the conspiracy itself is the *corpus delicti.*

Mr. SMITH.—Might I ask the Court just this one question, so that I may be able to follow the Court: Suppose that this indictment simply stated the one overt act of conspiring to maintain a nuisance at 2031 Steiner Street, and set out no overt act, and the evidence introduced here was limited to the matters that are now attempted to be elicited from this witness by the Government, would the Court in that case rule that evidence of what took place at that time of matters that had been before this court for which the defendant has pleaded guilty, would be admissible.

The COURT.—I have no question about it.

Mr. SMITH.—We note an exception.

The COURT.—You may answer.

(Testimony of D. W. Rinckel.)

A. I went there by virtue of a search-warrant, and upon searching found a quantity of liquor. [256]

Mr. GILLIS.—Q. What did you find?

A. Altogether, there were 150 gallons of wine, three one-fifth gallon bottles of jackass brandy, two one-half gallon bottles of jackass brandy.

Q. Do you know whose place that was?

A. It was Eddie Marron's.

Mr. GILLIS.—That is all.

Mr. SMITH.—No questions.

Mr. GILLIS.—We offer in evidence the record of this Court in case No. 13,362, which is a record of the information, plea of guilty, and payment of fine.

The COURT.—As to this last place that you speak of?

Mr. GILLIS.—As to the last place.

The COURT.—All right; admitted.

(Rep. Tr., Vol. 4, pp. 209 to 213, inc.)

(Said record of action No. 13,362 was thereupon admitted into evidence and said record shows that defendant Joseph E. Marron, *alias* Eddie Marron, pleaded guilty to a violation of the National Prohibition Act on April 4, 1924; and was thereupon fined the sum of $400, which said fine was paid on April 14, 1924.)

TESTIMONY OF F. D. STRIBLING, FOR THE GOVERNMENT.

F. D. STRIBLING, a witness called on behalf of the Government, being sworn, testified as follows:

My name is F. D. Stribling and I am by occupation an Internal Revenue Chemist for the U. S. Government.

Q. I show you bottle numbered 27,940 and ask you if you have examined that to determine the alcoholic content? A. I have.

Mr. O'CONNOR.—Just a moment. That is objected to as immaterial, irrelevant and incompetent, and there is no showing here that this liquor here that the chemist is about to testify to is the same liquor which was seized at any of these places, and was turned over to him. [257]

The COURT.—Overruled.

Mr. O'CONNOR.—Exception.

Mr. SMITH.—May that same objection go to the defendants Marron and Birdsall, with the objection that there has been no proper foundation laid?

The COURT.—Yes. [258]

Mr. SMITH.—Exception.

A. 5.37 per cent alcohol by volume.

Mr. GILLIS.—Q. What does that make the proof? A. That makes the proof 11.7.

Q. The proof is always double the alcoholic content? A. Double the alcoholic content.

Q. Is it fit for beverage purposes. A. Yes.

Q. Where did you receive that bottle?

(Testimony of F. D. Stribling.)

A. At the laboratory—

Mr. SMITH.—We will object to that question on the ground it calls for the conclusion of the witness.

The COURT.—You have sufficiently identified it, Mr. Gillis. The officer testified that this was found at one of these places involved, and he testified that he had it and examined it.

Mr. GILLIS.—I ask that that be introduced in evidence and marked Government's Exhibit next in order.

Mr. O'CONNOR.—To which we object on the ground it is immaterial, irrelevant and incompetent.

The COURT.—Overruled.

Mr. O'CONNOR.—Exception.

Mr. SMITH.—Yes.

(The bottle No. 27,940 being a pint bottle about 1/3 full of Rainier Beer was thereupon admitted into evidence and marked U. S. Exhibit 8.)

Mr. GILLIS.—Q. I show you bottle numbered 26,733, and ask you if you examined that to determine the alcoholic content? A. I have.

Mr. O'CONNOR.—The same objection.

Mr. SMITH.—May we have the same objection and exception to all of these?

The COURT.—Yes.

Mr. GILLIS.—What is the alcoholic content?

A. 4.87 per cent by volume, alcohol by volume.

Q. Fit for beverage purposes? A. Yes. [259]

Mr. GILLIS.—I offer it in evidence and ask that it be marked Government's Exhibit next in order.

(Testimony of F. D. Stribling.)

(The bottle No. 26,733, being a pint bottle about one-half full of Cascade Beer was thereupon admitted into evidence and marked U. S. Exhibit 24.)

Q. I show you bottle 27,160, and ask you if you have examined that for its alcoholic content?

A. I have.

Q. What is it? Has the clerk pasted over your label?

A. That has a memorandum over it. I can get it.

Q. All right. A. I have no record of 27,160.

Q. All right, we will put that to one side. I show you bottle 26,792, and ask you if you have examined that for the alcoholic content? A. I did.

Q. What is it?

A. 44.1 per cent of alcoholic by volume.

Mr. GILLIS.—I ask that that be introduced in evidence and marked.

(The bottle No. 26,792, being a one-fifth gallon bottle full and labeled Gin was thereupon admitted into evidence and marked U. S. Exhibit 28.)

Q. I show you bottle 27,156, have you examined that? A. I don't remember this one.

The CLERK.—That has not been marked for identification.

A. I probably made a mistake when I identified this other one, here.

Mr. GILLIS.—Q. This one?

A. No, that one, that I had no record of.

(Testimony of F. D. Stribling.)

Mr. O'CONNOR.—Q. You did not identify that one, I don't think? A. No.

Mr. GILLIS.—I think this is not part of the evidence. The label shows it is not.

Q. I will show you bottle 26,791, and ask you if you have examined that? A. I have.

Q. What is the alcoholic content?

A. 44.35 per cent alcoholic by volume.

Mr. GILLIS.—I ask that that be introduced in evidence and marked.

(The bottle No. 26,791, being a one-fifth gallon bottle full of rum was thereupon admitted into evidence and marked U. S. Exhibit 27.)

Q. I show you bottle No. 26,734, and ask you if you have examined that? A. I have.

Q. What is the alcoholic content?

A. 12.26 alcohol by volume. [260]

Mr. GILLIS.—I ask that this be introduced in evidence.

(The bottle No. 26,794, being a one-fifth gallon bottle one-half full of Victor Cliquot Champagne was thereupon introduced into evidence and marked U. S. Exhibit 30.)

Q. I show you bottle 26,790 and ask you if you have examined that? A. I have.

Q. What is the alcoholic content?

A. 44.86 per cent alcohol by volume.

Mr. GILLIS.—I ask that that be introduced in evidence.

(The bottle No. 26,790, being a one-fifth gallon

(Testimony of F. D. Stribling.)

bottle full of Scotch Whiskey was thereupon introduced into evidence and marked U. S. Exhibit 26.)

Q. I show you bottle 26,733A and ask you if you have examined that? A. I have.

Q. What is the alcoholic content?

A. 50.25 per cent alcohol by volume.

Mr. GILLIS.—I offer that in evidence.

(The bottle No. 26,733A, being a one-fifth gallon bottle full of Bourbon Whiskey was thereupon introduced into evidence and marked U. S. Exhibit 23.)

Q. I show you bottle 26,793, and ask you if you have examined that? A. I have.

Q. What is the alcoholic content?

A. 50.04 per cent alcohol by volume.

Mr. GILLIS.—I ask that that be introduced in evidence.

(The bottle No. 26,793, being a one-fifth gallon bottle full of Bourbon Whiskey was thereupon introduced into evidence and marked U. S. Exhibit 29.)

Q. I show you bottle 27,938, and ask you if you have examined that? A. I have.

Q. What is the alcoholic content?

A. 50 per cent alcohol by volume.

Mr. GILLIS.—I ask that that be introduced in evidence.

(The bottle No. 27,938, being a one-fifth gallon bottle one-half full of Bourbon Whiskey was thereupon introduced into evidence and marked U. S. Exhibit 6.)

(Testimony of F. D. Stribling.)

Q. I show you bottle No. 27,937 and ask you if you have examined that? A. I have.

Q. What is the alcoholic content?

A. 17.6 per cent alcohol by volume.

Mr. GILLIS.—I ask that that be introduced in evidence. [261]

(The bottle No. 27,937, being a one-fifth gallon bottle full of Sherry Wine was thereupon introduced into evidence and marked U. S. Exhibit 5.)

Q. I show you bottle 26,569, and ask you if you have examined that? A. I have.

Q. What is the alcoholic content?

A. 18½ per cent alcohol by volume.

Mr. GILLIS.—I ask that that be introduced in evidence.

(The bottle 26,569, being a one-fifth gallon bottle full of Sherry wine was thereupon introduced into evidence and marked U. S. Exhibit 22.)

Q. I show you bottle 27,936, and ask you if you have examined that? A. I have.

Q. What is the alcoholic content?

A. 19.96 per cent alcohol by volume.

Mr. GILLIS.—I ask that that be introduced in evidence.

(The bottle 27,936, being a one-fifth gallon bottle full of port wine was thereupon introduced into evidence and marked U. S. Exhibit 4.)

Q. I show you bottle 28,004, and ask you if you have examined that? A. I have.

Q. What is the alcoholic content?

A. 5.3 per cent alcohol by volume.

(Testimony of F. D. Stribling.)

Mr. SMITH.—I ask that that be introduced in evidence.

(The bottle No. 28,004, being a one pint bottle one-third full of Vermuth was thereupon introduced into evidence and marked U. S. Exhibit 13.)

Q. I show you bottle 26,798 and ask you if you have examined that? A. I have.

Q. What is the alcoholic content?

A. 52.49 per cent alcohol by volume. [262]

Mr. GILLIS.—I ask that that be introduced in evidence.

(The bottle No. 26,798, being a one-fifth gallon bottle full of Jackass Brandy was thereupon introduced into evidence and marked U. S. Exhibit 25.)

Q. I show you bottle No. 27,939, and ask you if you have examined the alcoholic contents of that?

A. I have.

Q. What is it?

A. 12.12 per cent alcohol by volume.

Mr. GILLIS.—I ask that that be introduced in evidence.

(The bottle No. 27,939, being a one pint bottle one-third full of Champagne was thereupon introduced into evidence and marked U. S. Exhibit 7.)

Q. I show you bottle numbered 28,002, and ask you if you have examined that? A. I did. [263]

Q. What is the alcoholic content?

A. 44 per cent of alcohol by volume.

Mr. GILLIS.—I ask that that be introduced in evidence.

(Testimony of F. D. Stribling.)

(The bottle No. 28,002, being a one and one-half pint bottle full of Rum was thereupon introduced into evidence and marked U. S. Exhibit 12.)

Q. I show you bottle 28,001, and ask you if you have examined that? A. I have.

Q. What is the alcoholic content?

A. 45.6 per cent alcohol by volume.

Mr. GILLIS.—I ask that that be introduced in evidence.

(The bottle No. 28,001, being a one-fifth gallon bottle one-third full of Canadian Club Whiskey was thereupon introduced into evidence and marked U. S. Exhibit 11.)

Q. I show you bottle numbered 27,999 and ask you if you have examined that? A. I have.

Q. What is the alcoholic content?

A. 49.3 per cent by volume.

Mr. GILLIS.—I ask that that be introduced in evidence.

(The bottle No. 27,999, being a one-fifth gallon bottle full of Gordon Gin was thereupon introduced into evidence and marked U. S. Exhibit 9.)

Q. I show you bottle numbered 28,003, and ask you if you have examined that? A. I have.

Q. What is the alcoholic content?

A. 19.26 per cent by volume.

Mr. GILLIS.—I ask that that be introduced in evidence.

(The bottle No. 28,003, being a one-fifth gallon bottle one-third full of Vermuth was thereupon in-

(Testimony of F. D. Stribling.)

troduced into evidence and marked U. S. Exhibit 13.)

Q. I show you bottle 28,000 and ask you if you have examined that? A. I have.

Q. What is the alcoholic content?

A. 38 per cent of alcohol by volume.

Mr. GILLIS.—I ask that that be introduced in evidence. [264]

(The bottle No. 28,000, being a one-fifth gallon bottle one-half full of Scotch Whiskey was thereupon introduced into evidence and marked U. S. Exhibit 10.)

Q. All of these liquors that you have testified to here are fit for beverage purposes? A. They are.

Mr. GILLIS.—That is all.

Mr. SMITH.—No question. [265]

TESTIMONY OF E. O. HEINRICH, FOR THE GOVERNMENT.

E. O. HEINRICH, a witness called on behalf of the Government, being sworn testified as follows:

Direct Examination.

(By Mr. GILLIS.)

My name is E. O. Heinrich, and my business is examiner of suspected and disputed documents, practicing as a legal chemist, and microscopist. My office is in San Francisco and my residence and laboratory in Berkeley. I am a graduate of the University of Berkeley, College of Chemistry. I was consulted first in this case by Mr. Oftedal of

(Testimony of E. O. Heinrich.)

the Customs Intelligence Unit, and later confirmed and ratified by the office of the United States Attorney. I have been practicing my profession for twelve or thirteen years. I have testified in federal cases of the States of California, Oregon and Washington, Army Courts in the Western Department at San Francisco, and State and District Courts in all of the States of the west, west of Denver, except Wyoming and New Mexico. Whereupon the Court deemed the witness qualified as an expert. I have made an examination of Government Exhibit 3, Government Exhibit 32, Government's Exhibit 31 and the slips of paper that are contained in Government's Exhibit 17, and Government's Exhibit 18. I have examined and compared the handwriting and have prepared certain illustrations therefrom. These illustrations are photographic illustrations of various features of the writing which illustrate the course of my reasoning and conclusions.

Mr. SMITH.—May it please the Court, in order that we might have fully developed how he arrived at this conclusion, it seems to me we should first have his reasons, because his reasons may prevent an answer later on; he may not be qualified. We may show he is not qualified to judge, after giving his reasons.

The COURT.—Mr. Smith, you know the settled procedure in these cases. The examination of any expert is always a conclusion. The party presenting him does not have to ask him for his rea-

(Testimony of E. O. Heinrich.)

sons unless [266] they want to. He is then subject to the fullest cross-examination as to the basis of his reasons. That is settled practice. Overruled.

Mr. SMITH.—Exception.

WITNESS.—I have examined all of the exhibits just shown me and have come to a conclusion as to who wrote the writing that is contained in Government's Exhibit 3 from page 34 on. The majority of the entries, 90 per cent, or more of the entries which represent transactions or which represent business memoranda—

Mr. SMITH.—We will object to that on the ground that it is calling for matters that have not been shown to be within the particular knowledge of the expert.

The COURT.—Overruled.

Mr. SMITH.—Note an exception.

A. —were written by the same person who signed Government's Exhibit No. 32, with the name "Joseph E. Marron" and the address "2031 Steiner Street."

Mr. GILLIS.—Q. Now, from an examination of the exhibits that you have made have you arrived at an opinion as to who wrote on the slips of paper contained in Government's Exhibit 17 A. Yes.

Q. Who wrote them?

A. They were written by the same writer who signed Government's Exhibit 31 with the name "George Leo Birdsall" and the address "519 Belvedere Street."

(Testimony of E. O. Heinrich.)

Q. Will you now, Mr. Heinrich, using your photographic illustration explain and show how you arrived at that conclusion?

A. In one of the answers that I gave I said that the majority of the writing, beginning with page 34, was by the writer who wrote the signature to Government's Exhibit 32. That answer referred to the words which are in the respective columns and to the dates and amounts which are set opposite them, and except such items as appear in the footings of the columns on the majority of the pages, and various check marks which occur opposite certain entries running throughout these pages. Now, the first point that I wish to illustrate is that I found on examining this book that the writing was of a uniform appearance [267] throughout the book, beginning with page 34, or one or two pages earlier, and that it had the same features of a cramped style, the same general appearance as to the condition of the page, the manner of inserting in the writing space the same appearance of roundness of the various letters, and I found on further examining into that that this writer wrote on a system which was such that the small letters, take the letter "a" for instance, if measured and blocked out, would fit into small squares, as opposed to other writing systems and other methods of writing in which writers are taught to place the letters, make the letters so that they would be enclosed in a rectangle whose sides are longer than the base and top. In addition

(Testimony of E. O. Heinrich.)

to that squareness of the small letters, there was a standard regular enlargement, an ovality of the loops of the letters "g," "y" and "z," and such letters as have loops below the line. These pages that I have put on here are pages, illustrations of pages 34, 42, 80 and 93, in their entirety. They were not especially selected, but have been taken for the purpose of illustrating what all of the pages in that book, beginning with page 34, look like, and how they look of their general appearance, and the general feature of the writing all resembling each other. That is without reference to who wrote them, the point being that the same person who wrote 34 also put the same identical appearance and manner of construction in the writing appearing on page 42 and page 80 and page 93, and all of the pages intervening, so that with the exception of these points that I have already mentioned the figures which appear in totals and check marks such as would be made in auditing an account of this kind, the writing is all of one and the same person. Now, in order to illustrate that more definitely, I have another set of exhibits in which the writing is made very much larger. Those I wish to put on the board now. On investigating more closely the general appearance of similarity between the respective pages, and considering the reason for the appearance of [268] the cramped style in the writing, I found that the writing was executed with a movement limited largely to the action of the fingers, and that it included in that move-

(Testimony of E. O. Heinrich.)

ment a definite, incomplete but regular and smoother turn to the corners of the writing in making the oval turn from left to right or right to left, and that showed particularly in the upper right-hand corner of the oval turn. I found as a starting point an entry at the top of page 82 which had the two letters reading "Personal Ed" and "I. O. U" over the left-hand column of the page. Now, on examining that writing, I found in the "P" of "Personal," in the upper right-hand corner of that oval turn a definitely defined inco-ordination of the writing I have mentioned at that point, with the result that the characteristic tremor or flattening of the letter there is definitely shown. My inquiry there was to determine whether the person who had written "Personal" had also written "I. O. U.," and I found, in considering that same oval movement, in the capital I, that that same inco-ordination was shown in the upper right-hand quadrant or portion of the oval movement at the tip of the "I," and that we get the corresponding flattening on that movement. That is, to me, conclusive evidence of one and the same hand writing the entries. The writing of the word "Personal" is continuous, the condition and pressure of the pencil on the paper is in complete harmony throughout with that shown in the letter "P" of that word, and is true for the name "Ed," and the initials "O. U." following "I." I found on these grounds that the entire entry "Personal Ed" and the next letters reading "I. O. U." were writ-

(Testimony of E. O. Heinrich.)

ten by one and the same person, independently now of who that person may have been.

Mr. SMITH.—So that there will be no question as to the rights of Marron and Birdsall, I would like the record to show that all of this testimony goes in over their objection.

The COURT.—Overruled.

Mr. SMITH.—Note an exception. The objection being the same as was [269] urged at the time of the introduction of the book and the other documents.

The COURT.—All right. You may proceed, Mr. Heinrich.

Mr. O'CONNOR.—I understand the documents have not been offered in evidence. Isn't that correct?

Mr. GILLIS.—They have not yet been, but I shall offer them in evidence.

A. Having called attention at the close of the morning session to my conclusion that the first two entries on the left-hand side of page 82, reading "Personal Ed" and "I. O. U." were written by the same person, independent of who that person may be, I want, in addition, to call attention, in passing, to the emphasis given to the terminal of the stroke of the "l" in "Personal," and the "d" in "Ed," and will again call attention to it in connection with some other writing.

Now, the group "I. O. U." includes a very highly developed manner, characteristic manner of forming a capital "O"; the closing movement is dropped

(Testimony of E. O. Heinrich.)

down below the top in such a manner that it may be considered, for the purpose of illustration, as either a poorly made "O" or a poorly made digit "6." Going to the other side of the page, the right-hand column, we find in the upper portion of the column the words "Money out, Wendler check, Argyle." In the word "Out," we find identically the same formation of the capital "O" as we found above in the entry "I. O. U." and the manner of shading the turn at the base of the letter, and the pressure emphasis throughout that movement is the same in the "O" in the entry "Money Out" as it is in "I. O. U." In comparing the word "Money" with the word "Personal," we find in the word "Money" the group "On" appearing as a replica of the group "on" in the word "Personal." In addition to the capital "O" identified in "Out," and the "on" identified in "Money," there also is the individualized manner of [270] making an "e" without having a loop, it is a collapsed letter, just as appears in the word "Personal." On that basis, I found that "Money Out" was written by the same person who wrote "Personal Ed" and "I. O. U." I notice in this word "Money" that on the clockwise turn over that oval movement that this writer does succeed in making that curve voluntarily as against loops as shown in "Personal" and "I," and this writer has the ability, as shown in this word "Money," to make that movement properly, and, as the book shows elsewhere, with considerable frequency.

(Testimony of E. O. Heinrich.)

Now, regarding "Money" and comparing it with "Wendler Check" appearing immediately below, we have the collapsed "e" appearing and also terminal "y" in "Money," in the collapsed "e" appearing before the terminal "r" in "Wendler," and we have the "d" construction, the "a" portion of it corresponding completely in its proportion, the initiation of the movement and form with the "a" in "Personal"; we have the collapsed "e" again appearing in "Check," and we have, in addition to that, the "d," which is a letter which is sought to be written shorter than the "l" appearing at the same height as the "l" just as it does in "Personal Ed," giving us "Wendler, Check," as also having been written by the same person as the foregoing, and allowing us to proceed to "Argyle," where we have first the terminal movement in closing the "e" at the end of the word that you see in "Personal," and "Ed," the same "a" construction, both in the "a" and the initial oval of the "g" as appears in the "d" in "Wendler" and the "a" in personal; also, we have the same enlargement in "Money" in the words "Money Out." On these identities, it was my conclusion that this portion of the page had been written by the same person who wrote the initial entries on the page, reading "Personal Ed I. O. U."

That gave me, in addition to the character of the alphabet found in the first entry, certain characteristic forms affecting other letters. [271] We have the terminal "t" in the word "Out," crossed

(Testimony of E. O. Heinrich.)

in an individualized manner, both as to the manner of effecting the "t" crossing by bringing it up with a continuous movement from the stroke of the letter to the left side and then crossing over and terminating with a heavy pressure at the end of the stroke. We have the individualized manner of making the loop in the letters having the loop below the line; and we have introduced the capital "W" with the same type of individualized leading stroke, and "k" having as its feature the absence of the properly formed loop in the upper portion of the letter, and a heavy terminal stroke similar to the terminal of the "l" and "d" in the word "Personal Ed"; we have also added the letters "Ch," "g," "y" and "r," in a slightly different formation from the ones appearing above. Now, in comparison with this I have brought a section of page 100, a section of the handwriting which appears in the right-hand corner of page 100, and which begins with the word "Yeager" and ends with the word "Joseph." By referring now to the words which I have previously described and noting the identities, I find first of all in the word "George Kent" the same individualized terminal "t" which I have illustrated in the word "Out." I find the same collapsed "e" in the word "Kent" that we have already noted in "Wendler Check," "Money," and "Personal," and we also see that in the abbreviation for "George"; we see the same thing in "Yeager," the collapsed "e" preceding the terminal letter; and in the two words immediately above

(Testimony of E. O. Heinrich.)

the "George Kent" a letter with a loop below the line, the loops being formed in the same manner and with the same proportions as those appearing in "Argyle" and "Money," the capital "y" in "Yeager" and capital "M" in the next word, which has the same initial features as the "M" in "Money," and the "W" in "Wendler," in the exemplar taken from page 82, together, also, with the terminal pressure increasing to the end, at the end of the "r's" in the first two words. [272] This extends also to the words which through the deletion appears to me to be "Englander," where we have the same enlarged feature of the loop, the lower case letter, the same excessive terminal pressure on the end of the stroke, the same relation of the height of the "d" to the rest of the word, and the same proportion of the "E" as we have already noted in connection with "Ed" and "Personal"; also, in the abbreviation "Pd," the same relation of the "d" to the capital letter, particularly in the first one, where it appears taller; the same direct downward terminal in the abbreviation for August, the same manner of enlargement of the loop of the "g," and closing it as shown in the "y" of "Money"; that is still further carried out in the word "Joseph," where we have first the terminal made in the same identical manner as the terminal in "Yeager," and the same shaped "g," made in the same identical manner as far as the stem, the lower loop are concerned, with the "P" in "Personal," the initial stroke being added

(Testimony of E. O. Heinrich.)

here by reason of its position in the word; the same collapsed "e" that we have noted already again appearing in "Yeager," on the same shading, the same manner of hooking in one the "r" on the terminal as appears in "Personal"; and by these characteristics which appear also in the previous writing, I find that this writing is by the same writer who wrote the entries on page 82, giving me now, in addition to the letters heretofore compiled of the alphabet, the letters "K" in Kent which is a highly individualized letter, including, as one of its features, a co-ordinated movement in the first stem, a very highly individualized "G," in which the initial loop is shorter than is regularly taught in the writing system, and the initial loop is no higher, or very little higher than the shoulder on the right-hand side of that letter. The additional letters that are picked up are "J" in "Joseph," the "Y" in "Yeager," and the "P" and the "A." Now, proceeding to the next illustration which is selected from [273] Page 104, right-hand column of that page, we have the word, "Kissane" appearing above the line reading, "Papers, Lemons," and the next line reading, "Grenadine," we have in "Kissane" a repetition of the same "K" that we found in "Kent," we have the repetition of the same terminal movement that we have heretofore seen in "Argyle" and "Personal," the same feature of the formation of the "s" that we have already seen in "Joseph" and in "Personal," and the same absence of the "i" dot, the manner of

(Testimony of E. O. Heinrich.)

forming the "i," and in the word "Papers" we have again the same heavy terminal on the "r" with a collapsed "e" immediately preceding it that we find in "Yeager" and "Wendler," the "P" formed in the identical manner as to its formation, as the "P" in "Personal," the "A" construction paralleling the "A" in other words above, such as "Argyle" and "Personal," and the enclosed "P" in Papers following the same formation, that is, the upper stem connected with the preceding letter, a loop below the line, and closing with a buckle formed in a manner as we find in "Joseph," a little more cramped in, but, nevertheless, of the same form.

Going below to "Grenadine," we have there a repetition of the capital "G" which we found in "George Kent," and the other letters, having the same loop that we have already seen in the other words. These specimens which I have selected here are illustrative of the manner in which I proceeded to go through the book, starting with the individualized instances, and finding in the book the co-ordination feature appearing on two successive lines, where the movement was similar, as appears in the words, "Personal Ed" and "I. O. I.," giving me a feature of the personal writing habit, which is due to a certain writing habit over which the writer has no control. By following these features as I have compiled them here, I found that they were regularly repeated page for page, without any more variation than that variation, which is normal

(Testimony of E. O. Heinrich.)

to any person's writing, without effort or disguise, [274] and having all the same characteristic appearance. I found on each page, in addition to what I have pointed out, that all of this writing had a certain hall mark, as it were, an individualism which is so constant that it serves to identify the writing almost the instant at which it is seen, and that is the heavy terminal pressure of which I have several appearing on certain letters, appearing on all these letters, or many of these letters, most of these letters which have a terminal movement to the right, at the close of the word.

Going now to the next illustration which is taken from page 103, which reads, "1 Vermuth" down to the words, "1 Set" opposite the date "30," I have here a group of the terminal features of which I have spoken, and in which it appears that characteristic, and I refer particularly to that pressure at the end of the stroke which gives to the terminal stroke a club-like feature; most writers, in writing, are at that point in the act of lifting the writing instrument from the paper, with the result that we have there a diminished line, a line coming to a point. This writer does not do that; he comes to a full stop, with a writing instrument on the paper, and with a pressure increasing to that point. The result is that we have a club-like formation on his terminals, such as is shown in the word "Rainier," in the abbreviation "Bourb," in the word "Club," again, in the word "Beer," again, the abbreviation "Bourb," again, in the word "Beer," again, in the

(Testimony of E. O. Heinrich.)

word "Club" and it is also present in the "t" crossings appearing with considerable frequency. In the next illustration, taken from page 91, in the first word "Set," that same club-like feature occurs in the crossing of the "t," and it appears in the terminal of the word "Club" immediately above it, and it appears in the terminals of the illustrations taken from page 103. Now, we have here these other sheets for example, the peculiar manner of finishing the terminal "t" illustrated in the word "Set," on both the illustrations taken from page 103 and 91; in the illustration from page [275] 91 it occurs also in the word "Port"; the writer shows in the word "Set" that at times he will make a normal "t" crossing in the terminal position, but the frequency with which I found the manner in which the "t" occurs is continuous from the foot of the letter up to the position for crossing the vertical stroke, and then across, that that is the habitual way of doing it, and identifies the writer as being the same person who wrote the word "Out" on the previous exhibit. In this manner I have identified the writing on all of the pages that I have enumerated, from page 31 on, not all of the writing, but the major portion of the writing, amounting to about 90 per cent of it, on the pages, on many pages, much more and on one or two pages somewhat less, but the average being over 90 per cent, the writing of this particular writer. Now, you will notice here with this other exhibit that I have also picked up additional letters of the alphabet, and in this way

(Testimony of E. O. Heinrich.)

I have built up for the purpose of the examination the entire alphabet of this writer. I then compared this writing with the writing which appears on Government's Exhibit 32, and in particular with that portion of the exhibit which reads, "Joseph E. Marron, 2031 Steiner Street," and that portion of the exhibit appearing as a signature to an affidavit of registration. I also had before me a photographic copy of an affidavit of candidates, which is marked Government's Exhibit 18, and which also has the signature, "Joseph Edmund Marron." I brought these signatures as they appear on this exhibit together on a photographic enlargement of the same character as those I have been discussing, together with the address as it appears on the affidavit of registration. First of all, I wish to call attention to the hall mark on the terminal, of which I spoke in connection with the other writing, in the word "Steiner," and in the word "Marron," and particularly in the word "Steiner" there appears that terminal pressure on the end of the [276] stroke which is individualistic to the writer who has written the exhibits that I have been discussing, and which shows itself by the two occurrences in the names "Marron" and "Steiner," and slightly less developed in the word "Joseph," as being a feature of this writer's handwriting.

Mr. GILLIS.—Pardon the interruption, Mr. Heinrich: The top [277] "Joseph Edmund Marron" that appears upon that sheet that you have

(Testimony of E. O. Heinrich.)

just placed upon the blackboard, is that written in ink, or pencil?

A. That was written in ink and is the manner in which that signature was written on the affidavit of candidates, Government's Exhibit No. 18, as shown by the photographic copy from which I worked.

Q. How about the "Joseph E. Marron" just below that?

A. The "Joseph E. Marron" appearing just below that, appearing over the word "Steiner," here, was written in an indelible pencil on the affidavit of registration which is Government's Exhibit 32, and that is in color black, as against the grayer signature immediately below. I might say that all of the book that I can now recall was written in pencil, I think all of it. Considering further this signature, we have in this signature the word "Joseph"; we have also, as exemplified here from page 100 the name "Joseph" as written by the writer, who wrote the majority of the book, and there we have point by point in the signature "Joseph E. Marron" the same identical features that we have, point by point, in the one in which "Joseph" has been written in this book. We have, first, in the matter of the capital "J" the proportion shown by the upper loop of that "J" to the lower portion, the enlargement of the lower portion, the lower loop of the capital "J" over the degree of ovality of the upper portion, the dark corner made in turning, the apex of that movement

(Testimony of E. O. Heinrich.)

contrasted with the smooth curve of the turn at the bottom of that letter as it comes down from the initial movement into the lower loop; we have a direct connection with the capital "O" the terminal of the "O" brought up to the top of the letter and moving into the next without a loop, as shown in each case, the passing over of the tip of the "s" without a shoulder, and closing with a hook movement that brings the direction well up [278] into the center of the letter, running then into a collapsed "e" immediately preceding the "p" in "Joseph," and passing from the "p" into the word "Joseph" with an upward movement of the stem, which is not retraced on the downward movement of the main letter, finishing the "p" with a large oval such as we found in the earlier specimens of the writing in the book, closing with a buckle which has all of the features of the letter "s," and then finishing with an "h," whose relation to the "p" immediately preceding is that the height is dropped off as the word is coming to a close. We have in the exemplar before us a uniform steady pressure, running to the end of the word, which shows by its shading a similar characteristic to the termins which have resulted in the full expression of that pressure and substroke in "Steiner" and "Marron," and we have that same feature in "Joseph" appearing on page 100. The ink name feature covers the same point, with the difference that the ink writing is much more carefully made, and which has been much more firmly written with an instru-

(Testimony of E. O. Heinrich.)

ment—a slight tremor throughout the writing shows this writer to have some regular difficulty, which does not appear with anywhere near the same frequency in the specimens of the pencil writing as furnished by his signature on the affidavit for election. We have in the "E's" the same "E" formation that we have already pointed out in "Ed," the same "M" formation in "Marron" that we find in "Money," the same "Ae" formation that we have in "Argyle," the same "on" formation that we have in "Money" and in "Personal," and when we come to consider the word "Steiner," we have the same individualism of the hook, the capital "S," with the crossing of the "t" that we find in the word "Stock" which is here exemplified from page 91. On these rounds, from the presence in this signature of these individualisms which are so highly identified, appearing all [279] through the writing in the book, and also in both of these exemplars, I reached the particular conclusion that I have expressed, that the major portion of the entries in the book at page 34 and subsequent thereto are by the same writer who signed this affidavit "Joseph E. Marron," Government's Exhibit 32.

Now, with respect to the five slips of paper which form Government's Exhibit 17, I have stated my answer to the question that it was my opinion that the five slips of paper which are shown here photographically enlarged were all written by the same person who signed the name "George Leo Bird-

(Testimony of E. O. Heinrich.)

sall," and the address 519 Belvedere Street, on Government's Exhibit 31. I first compared these slips with each other to determine if all of these slips were written by one and the same person. I first noticed in reading these slips that four of them bore a date in September, which date is abbreviated "Sept," and followed by a numeral. Now, in each case, in considering the word "Sept," I found that the "Sept" was individualized by having a terminal "t" which consisted of a single stroke, and which had the crossing of the "t" located pretty well at the center of the letter, and which ended in a terminal stroke which diminished towards its end, as is regularly the case where the writing instrument is lifted from the paper while in motion, and which letter was disconnected from the previous letter "p," which preceded it, and that the stem was likewise disconnected from the buckle in each instance, and made as a separate stroke after lifting the writing instrument at the foot of the stem and carrying it to the point at which it is joined to the letter "t" to complete the formation of that letter, and to give it its identity. I found in each instance that the letter "e" of the group "Sept" was proportionately larger than the buckle following the "p," and bore an identical relation also to the "S" immediately preceding it, which was an identical character, [280] and that the "S" in each instance was initiated below the line with what we call a leading stroke, an unnecessary leading stroke, and it was closed in the same way. This first gave

(Testimony of E. O. Heinrich.)

me a tentative conclusion, or primary conclusion that all of these, at least these four "Sept.'s" were written by the same person. I found in addition that the fifth had a terminal "t" appearing in the word "Slot," that this terminal "t" had in every respect the same characteristic forms of the terminal "t" in "Sept."; that in the "S" of that word there was also the same feature as the "S" in the abbreviation for "September," and it also had the diminished letter, the same preceding to the right that we find running across the "t" of "Sept" moving across to the "o" and its further passage with the "t" in the word "Slot"; that led me to the conclusion that the same person who wrote the abbreviation "Sept" had also written the word "Slot," and since the "Slot Machine" is all one continuous page of writing, that that word "Slot Machine" had been written by the same person who wrote the dates. Now, I found in these slips the word "Birdsall" appearing twice, initiated with the capital "B," the word "Bell" appearing once, initiated with the capital "B," and the word "Bivens" appearing once, with a capital "B," and noting the manner in which the turning movement at the foot of the letter runs well below, in fact extraordinarily below the closing movement of the letter, and the manner in which the point of initiation of that letter is related to the central eyelet on the right-hand side of the double oval movement, I then came to this conclusion, that these capital "B's" were all written by the same person, and in

(Testimony of E. O. Heinrich.)

comparing the rest of the writing in these words, particularly the words "Birdsall" with each other, with the first four slips that I have been considering, the dates were written by one and the same person. As to the fifth slip, noting that it was written with the same characteristic diminution of the [281] letters that were found in the word "Machine," with the same writing pressure, and with the same instrument, by the way, the same pencil, I concluded on that basis that all five slips were written by the same person, irrespective of who that person was.

Now, in comparing the occurrence of the word "Birdsall" with the manner in which "Birdsall" appears on the affidavit of registration, I there found letter by letter the same characteristic forms in the exemplar signature that I found on the two slips. In this photograph I show it twice, I show it once on the large photograph, which bears all five of the slips, and I show it again at the foot of these two slips which are brought together, which show merely the name "Birdsall." There, again, in the capital "B" I found the initiation of the letter at a point immediately below the eyelet on the right-hand side, the closing of that letter at a point about midway down or up the initial stem, the collapsing of the "r" following the "i" to such an extent that without context it is indistinguishable from the "i" which immediately precedes it, the elongation of the "d" with respect to the small letters which accompany it, the separation of the "d" from the preceding "r," the separation of the

(Testimony of E. O. Heinrich.)

"s" from the following "a," and the reaching over in constructing the second "a" well over the top of the right-hand side for the initiation of the movement which does not appear on one of the tags, the second one here, but it does on the other; and in the same manner in which it appears in the exemplar; and the termination of the "ll" in "Birdsall" with the downward movement well below the line. I found in "Belvedere St.," the abbreviation "St.," the same individualized manner of forming that terminal "t" that we have in "Sept," and in "Slot," and the same type of leading stroke of the "S" that we find in "Sept," the same "B" in "Belvedere" that we have in "Birdsall" and "Bell," and "Bevins." It was upon these grounds [282] that I came to the conclusion that the writer who signs the name "Birdsall" on Exhibit 31 signed the five slips. Now, I found the name of Birdsall written once or twice in the book Government's Exhibit 3. One of these slips bears the words "Slot Machine." I also found the words "Slot Machine" entered in the gray ledger on one or more occasions. To illustrate the distinction between the writing of these two individuals as shown by their exemplars and by these exhibits, I have brought the words "Slot Machine," as it appears in the ledger in just a position with the "Slot Machine" as it appears on one of these small slips. The upper appearance of the words "Slot Machine" is as appears on the tag, which, in my opinion, was by the writer Birdsall; the lower appearance of the words "Slot Ma-

(Testimony of E. O. Heinrich.)

chine'' is as it appears in the book which I have stated in my opinion was by the writer Marron. The two writings differ from each other notably, first in the manner in which the terminal "t" is finished. Birdsall makes it as a single stroke, disconnected from the three preceding strokes, with a terminal which has an upper direction. The other writer gives a club terminal, which we find in the "l" of "Personal" and the "d" of "Ed," and elsewhere in these exhibits. The writer Birdsall, as he moves along from right to left continues to diminish his letters and his words, as if they were being driven into a cone, or so written that they could be driven into a cone. The other writer writes uniformly along as to the size of the smaller letters. They have that small club-like feature that I have mentioned before, but he includes on the end the hall mark of the club terminal, which is illustrated on the preceding illustration. The capital "N" of the two letters differs in the leading stroke in particular, and the height of the second and third shoulders as they follow. The writer of the book does not have an initial stroke leading up to the apex of his letter. He starts right off without any form of initial [283] movement, and his second and third shoulders do not rise to the same height as is shown by the other writer. The writer in the book makes a capital "S" as an enlarged form of the printed letter, as is shown by the several exemplars that we have brought here. The writer Birdsall makes the capital "S," if we should regard that as being written with a capital "S," as

(Testimony of E. O. Heinrich.)

an enlarged lower-case letter of the letter of the cursive type. We have here a distinctive specimen of the differentiation between the two writers, and I want to point out in the words "Slot Machine" as it appears on the book there appears to be a club terminal such as I have been discussing. I want to point out that it is not the type of club terminal I have been discussing. I have been discussing that type of club terminal which is made by an increase of pressure. Now, in the words "Slot Machine," as written by Birdsall, we have a club terminal which is caused by the shading of the pencil point with which that word was written, and where it was written with a pencil point which was in the shape of a carpenter's chisel point, and that all of these strokes which come in the turning movement, which were on the narrower side of the chisel, are representative of the thickness of the chisel point; all of the side swipes of that point show what appears to be a shaded feature. In starting a club terminal of the writer Marron we have that feature developed as a feature of the pressure applied to a round point and increased definitely and continuously until the end of the movement is reached.

Mr. GILLIS.—I now ask that these illustrations which have been put on the blackboard by the witness be introduced in evidence and be marked in the order in which they appear on the blackboard.

Mr. O'CONNOR.—As to the defendant Mahoney, they are objected to on the ground they are immaterial, irrelevant and incompetent, and no foundation laid for their introduction.

The COURT.—Overruled. [284]

Mr. O'CONNOR.—Exception.

Mr. SMITH.—May the record show an objection on behalf of the defendants Marron and Birdsall on the same grounds stated originally when the book, itself, was introduced and the papers were introduced?

The COURT.—Yes; the same ruling.

Mr. SMITH.—Note an exception.

(The illustrations were marked U. S. Exhibit 38.)

Mr. GILLIS.—Q. I show you Government's Exhibit 3, page 69, the lower two words on that page: Have you examined the word beginning with "P" to determine what that word was?

Mr. SMITH.—At this time, may it please the Court, counsel for the Government directs the witness' attention to the word, or the two words on the bottom line that were in dispute yesterday. At that time we had the man who wrote the words on the stand and he stated that to the best of his knowledge what those words meant was "New Policy."

Mr. GILLIS.—He stated he *guess* it was.

Mr. SMITH.—I don't think it is within the province of an expert on handwriting or otherwise, to come in and give his opinion as to what those words are when we have had the person who wrote the words present and testify.

The COURT.—Mr. Smith, if he had stated positively that those words meant "New Policy" and not "New Police," perhaps the situation would be different, although I do not think even that would exclude the Government from showing that it was

(Testimony of E. O. Heinrich.)

something else. But he did not say that. He said that it looked like to him "New Policy," and that he had no recollection whether it was "New Policy" or not.

Mr. O'CONNOR.—Will your Honor pardon me a minute while I get the record?

Mr. GILLIS.—Here is the testimony of the witness. In answer to [285] a question by the Court, "Is it 'New Policy' or 'New Police'?" the answer was, "It looks like 'Policy' here."

Mr. O'CONNOR.—Read on further.

The COURT.—Did I not ask a further question, as to which it was, or if he had any recollection?

Mr. SMITH.—You asked him the question, "Is it 'New Police' or 'New Policy,' " and he said, "It looks like 'Policy' here."

Mr. GILLIS.—And the question, "Do you remember?" and the answer, "I do not recall the item."

The COURT.—I felt sure of that. He may answer.

Mr. O'CONNOR.—May we have the further objection that it is an attempt on the part of the prosecution to impeach their own witness?

The COURT.—Overruled. You may answer.

Mr. O'CONNOR.—Exception.

Mr. SMITH.—May an exception also go to the defendants Birdsall and Marron?

The COURT.—Yes.

Mr. GILLIS.—Q. What is it?

A. It was originally written "Police" and by the

(Testimony of E. O. Heinrich.)

addition of two strokes the "e" was corrected to a "y."

Q. Is the correction that you see there made with the same lead pencil that wrote the word "Police"?

A. It was not.

Q. Mr. Heinrich, did you make some photographic copies of items coming from U. S. Exhibit 3, a typewritten page?

A. Yes, I made three of them.

Mr. GILLIS.—I will state to the Court that these are excerpts from Government Exhibit 3 that is in evidence, and I simply ask their introduction in evidence for the purpose of illustration.

Mr. SMITH.—What for?

Mr. GILLIS.—For the purpose of illustration.

Mr. SMITH.—Illustration of what?

Mr. GILLIS.—Take a look at them and see, Mr. Smith.

The COURT.—These are not photographs of the book. [286]

Mr. GILLIS.—These are not photographs of the book.

The COURT.—They are an enlargement of typewritten recapitulations?

Mr. GILLIS.—Yes, of excerpts from the book.

The COURT.—The only purpose they could have would be for use on the argument.

Mr. GILLIS.—Yes.

The COURT.—They will be admitted.

Mr. SMITH.—We will object to their introduction upon the ground that they are immaterial, ir-

(Testimony of E. O. Heinrich.)

relevant and incompetent, and they are not binding upon any of the defendants, and this is a self-serving paper, that is, a paper that was prepared by the Government to serve its own purposes, and could not possibly be binding on the defendants.

The COURT.—No, but from time immemorial, in order to aid the jury, the Court has permitted enlargements of these things which were in evidence—a recapitulation of them. Overruled.

Mr. SMITH.—There is nothing like this in evidence.

The COURT.—The objection is overruled.

Mr. SMITH.—We note an exception.

(The photographs were marked U. S. Exhibit 39.)

Mr. O'CONNOR.—An exception as to the defendant Mahoney?

The COURT.—Yes.

Mr. KELLY.—And as to all of the defendants?

The COURT.—Yes.

Mr. GILLIS.—You may cross-examine.

Cross-examination.

(By Mr. O'CONNOR.)

I was called in this case by the District Attorney and I do not know whether a subpoena has been issued for me or not. I first conferred in this case with Mr. Oftedal on or about November 22, 1924. I made photographic copies of these documents at that time. I completed the photographic copies November 28th. I am a paid expert [287] on behalf of the Government and am receiving in com-

(Testimony of E. O. Heinrich.)

pensation $25.00 a day for all time spent on the case. I first saw Government's Exhibit 18 in evidence on or about November 30th and it was delivered by Mr. Oftedal's staff.

(Rep. Tr., pp. 22 to 248 inc.)

TESTIMONY OF JOHN J. CASEY, FOR THE GOVERNMENT (RECALLED—CROSS-EXAMINATION).

JOHN J. CASEY, a witness on behalf of the Government, recalled for further cross-examination.

Cross-examination.

(By Mr. TAAFFE.)

I have received the reports of the chief that the sergeants and officers rendered with respect to their activities in the investigation of the premises at 1249 Polk Street. My orders to my men were given pursuant to an order or communication from the chief of police with reference to this place. These reports were rendered by the officers and sergeants in charge of the squads, as a result of my investigation in my official capacity, being received by the platoon commanders and in turn handed over to me. I recognize the handwriting in these instruments.

Whereupon, after argument by counsel, the reports were admitted in evidence and read into the record.

Mr. TAAFFE.—May I read these in evidence, if your Honor please?

The COURT.—Go ahead.

Mr. TAAFFE.—On the stationery of the police department, city and county of San Francisco, Police District No. 5, Bush Street Station, San Francisco, Cal., March 30, 1924.

"Captain John J. Casey:

Sir: I respectfully report the following:

Relative to the complaint from the Chief's office about bootlegging being carried on at 1249 Polk Street, upon investigation, I find that this is a six room flat occupied by a man named Birdsall. I have had an interview with the latter at said address [288] in regard to the above, and he denied that bootlegging is being carried on in his place. I went through all of the rooms in the flat and didn't see any evidence of liquor there." Signed: "Patrick Kissane, Police Officer, Star #80."

The COURT.—No need of reading the formal parts.

Mr. TAAFFE.—Another letter on the same stationery, Police District 5, dated March 29, 1924:

Captain John J. Casey,

Sir: I respectfully report the following: "Relative to the information received by the Chief of Police of the illegal sale of liquor at #1249 Polk Street, I called at said place at 10:50 A. M. this date; it is a flat occupied by Mr. George Birdsall for some time past. I saw no evidence of the sale of liquor." Signed by "John J. Farrell, Sergeant of Police." Also, on similar stationery, dated

March 30, 1924, addressed to Captain John J. Casey:

"I respectfully report the following: In regard to the complaint from the office of the Chief of Police regarding bootlegging being carried on at 1249 Polk Street, I visited this address, which is a top flat, occupied by a man by the name of George Birdsall as a residence, and I saw no evidence of liquor in the place. I will give this complaint my attention in the future. James A. Foohig, Police Officer."

Another dated March 29, 1924, to Captain John J. Casey:

"Relative to the complaint from the office of the Chief of Police about bootlegging being conducted at 1249 Polk Street. This is a 5-room flat occupied by George Birdsall, as a residence. I have never received any complaint about bootlegging being conducted at this place, and in the future will keep this place under observation. Robert E. Garrick, Police Officer."

Another dated March 28, 1924, to Captain John J. Casey, Subject Bootlegging 1249 Polk Street. 1249 is a flat occupied by George [289] Birdsall. He has been there for several months. I have never received any complaints of bootlegging or otherwise from premises since Mr. Birdsall has occupied the place. James M. Mann, Police Sergeant."

Another dated March 30, 1924, "Captain John J. Casey, Subject bootlegging, 1249 Polk Street. The

(Testimony of John J. Casey.)

above premises is a 5-room flat occupied by George Birdsall. I visited the premises and interviewed Mr. Birdsall. I saw no evidence of the law being violated, and I have never had any complaint from this place. I will keep this place under observation. Goodman H. Lance, Sergeant."

Q. Those reports were received by you in your official capacity as captain of the district, were they? A. Yes.

Q. The Mann that I have referred to is not a police officer?

A. He is a sergeant of police, and Lance and Farrell are sergeants.

Mr. TAAFFE.—That is all.

Mr. SMITH.—No questions for the defendants Birdsall and Marron.

Mr. O'CONNOR.—No question as to the defendant Mahoney.

Redirect Examination.

Mr. GILLIS.—One other report I see here from Patrick Kissane. We might as well have them all. That was received by you, was it? A. Yes.

Mr. GILLIS.—I ask that this be introduced in evidence.

(The document was marked U. S. Exhibit 40.)

"Report by Patrick Kissane: Suspected illegal liquor selling 1249 Polk Street flat second floor. George Birdsall, Proprietor."

Q. Captain Casey, you said on your cross-examination that Mr. Birdsall told you in his conversa-

(Testimony of John J. Casey.)

tion with you that the police had made several searches for liquor, there. A. Yes.

Q. Did you ask him what members of your squad had made the searches?

Mr. O'CONNOR.—That is objected to on the ground it is not proper redirected [290] examination.

The COURT.—Objection overruled.

Mr. O'CONNOR.—Exception.

Mr. SMITH.—The same objection as to the defendants Marron and Birdsall, and exception?

The COURT.—Yes.

A. I don't remember asking him that question, Mr. Gillis.

Mr. GILLIS.—Q. Did you ask him how much they searched?

A. I could not say that I did.

Q. Did you ask him where they searched?

A. I did.

Q. What did he say?

A. He said that they went through the place.

Q. Is that what he said, they went through the place? A. Yes.

Q. Did he tell you at that time that he was selling liquor there at that place?

Mr. O'CONNOR.—That is objected to on the ground it is leading and suggestive, and not proper redirect examination.

The COURT.—I will allow it.

Mr. O'CONNOR.—Exception.

A. He told me that he had been, yes.

No. 4523

United States

Circuit Court of Appeals

For the Ninth Circuit.

Transcript of Record.

(IN TWO VOLUMES.)

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Plaintiffs in Error,

vs.

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JOSEPH GORHAM,
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VOLUME II.

(Pages 353 to 702, Inclusive.)

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(Testimony of John J. Casey.)

Mr. GILLIS.—Q. Did he give you any reason as to why the police did not find anything on those searches?

Mr. O'CONNOR.—That is objected to on the ground it calls for a conclusion and opinion of the witness, and not proper redirect examination.

The COURT.—Overruled.

Mr. O'CONNOR.—Exception.

Mr. SMITH.—Furthermore, it is indefinite as to date, time and place.

The COURT.—I think the time has been fixed before, Mr. Smith.

Mr. GILLIS.—There is only one conversation connected with Birdsall.

The COURT.—That was fixed before.

A. No, he did not.

Mr. GILLIS.—Q. Did he tell you how many searches there were? A. No. [291]

Q. You did not inquire? A. No.

Mr. GILLIS.—That is all.

Mr. TAAFFE.—Government Exhibit 40 was exhibited by Mr. Gillis and was introduced in evidence and marked without any objection, and there was only a portion read by Mr. Gillis to the jury, and I would like the opportunity to read the whole paper to them. This is on the stationery of the Police Department of the City and County of San Francisco, Police District No. 5, Bush Street Station, San Francisco, March 3, 1924.

"Captain John J. Casey.

Sir: I respectfully report the following: Sus-

pected illegal liquor selling. Locations, business, names of proprietors, No. 1221 Polk Street, Restaurant, Louis Angelinich, Proprietor."

The COURT.—Is there anything on it except what was read that pertains to this place?

Mr. TAAFFE.—Not anything else with regard to this place, but in each instance the proprietor is marked down.

The COURT.—Mr. Gillis only read as to that one place. Does it refer to that place in any other part?

Mr. TAAFFE.—No, but it refers to these places.

The COURT.—That is, there are a number of bootlegging places, or charged bootlegging places mentioned.

Mr. TAAFFE.—One is a restaurant, and the supposition is it would not be.

Mr. GILLIS.—It is headed, "Illegal liquor selling."

The COURT.—It is headed, "Suspected illegal liquor selling."

Mr. TAAFFE.—Yes.

The COURT.—It is sufficient, Gentlemen, that it covers a number of other places besides 1249 Polk Street, and in each case the name of the proprietor is given.

Mr. TAAFFE.—The name of the person occupying the premises was put [292] down as proprietor. The word "proprietor" in the present case has a peculiar significance. That is all.

Whereupon, after the conclusion of testimony, the Government rested.

MOTIONS FOR DIRECTED VERDICT.

Mr. KELLY.—May it please the Court, on behalf of the defendant Gorham, I now move the Court to direct the jury to return as against him a verdict of not guilty, upon the ground that the Government has not offered sufficient evidence to submit the case to the jury as against him. In other words, on the ground that as a matter of law the evidence in this case is insufficient to warrant a submission of the case to the jury, or to warrant, if submitted to them, the finding of a verdict of guilty. I would ask the Court that the jury be excused for a few moments, so that I may briefly present the matter.

The COURT.—You want to make a motion, too, Mr. Taaffe.

Mr. TAAFFE.—Yes.

The COURT.—The statute requires the motion to be made in the actual presence of the jury.

Mr. TAFFEE.—I join, on behalf of the defendant Kissane, in the motion that has been made on behalf of the defendant Gorham, and on the same grounds.

Mr. SMITH.—For the purpose of the record, may the same motion be interposed on behalf of the defendants Marron and Birdsall, upon the grounds stated by Mr. Kelly in his request for a directed verdict as to the defendant Gorham?

The COURT.—Yes.

Mr. O'CONNOR.—And, for the purpose of the

record, the same motion as to the defendant Mahoney, upon similar grounds.

Motions are denied. [293]

down as proprietor. The word "proprietor" in the present case has a peculiar significance. That is all.

Whereupon, after the conclusion of testimony, the Government rested.

MOTIONS FOR DIRECTED VERDICT.

Mr. KELLEY.—May it please the Court, on behalf of the defendant Gorham, I now move the Court to direct the jury to return as against Gorham a verdict of not guilty, upon the ground that the Government has not offered sufficient evidence to submit the case to the jury as against him. In other words, on the ground that as a matter of law the evidence in this case is insufficient to warrant a submission of the case to the jury, or to warrant, if submitted to them, the finding of a verdict of guilty. I would ask the Court that the jury be excused for a few moments, so that I may briefly present the matter.

The COURT.—You want to make a motion, too, Mr. Taaffe?

Mr. TAAFFE.—Yes.

The COURT.—The statute requires the motion to be made in the actual presence of the jury.

Mr. TAAFFE.—I join, on behalf of the defendant Kissane, in the motion that has been made on behalf of the defendant Gorham, and on the same grounds.

Mr. SMITH.—For the purpose of the record, may the same motion be interposed on behalf of the defendants Marron and Birdsall, upon the grounds stated by Mr. Kelly in his request for a directed verdict as to the defendant Gorham?

The COURT.—Yes.

Mr. O'CONNOR.—And, for the purpose of the record, the same motion as to the defendant Mahoney, upon similar grounds.

MOTION FOR DIRECTED VERDICT ON BEHALF OF DEFENDANT KISSANE.

Mr. TAAFE.—May it please the Court, on behalf of the defendant Kissane, I now move the Court to direct the jury to return as to him a verdict of not guilty, upon the ground that the Government has not offered [294] sufficient evidence to submit the case to the jury as against him; in other words, on the ground that as a matter of law the evidence in this case is insufficient to warrant a submission of the case to the jury, or to warrant, if submitted to them, the finding of a verdict of guilty. The indictment by which these defendants are before the Court charges a conspiracy from about May 1, 1923, to the date of the filing of the indictment, which is October 17, 1924. The date of the consummation of the conspiracy is October 3d, 1924. Paragraph 35, found upon page 14, being the charging part of the indictment, charges that "George Hawkins, Walter Brand, Joseph E. Marron, *alias* Eddie Marron, George Birdsall, *alias* George Howard, Charles Mahoney, Patrick Kissane and Joseph Gor-

ham, hereinafter called the defendants, did at the City and County of San Francisco, State of California, in the Southern Division of the Northern District of California, within the jurisdiction of this Court, on or about the 1st day of May, 1923, the real and exact date being to said Grand Jurors unknown, and at all the time thereafter up to and including the date of the filing of this indictment, wilfully, unlawfully, feloniously and knowingly conspire, combine, confederate and agree together and with diverse other persons whose names are to these grand jurors and to this grand jury unknown, to commit the acts made offenses and crimes against the United States of America, that is to say, that said defendants then and there being did then and there wilfully, unlawfully, feloniously and knowingly conspire, combine, confederate and agree together and with diverse other persons whose names are to these grand jurors and to this grand jury unknown, with intent to and for the purpose of ". . . "did conspire to unlawfully possess liquor" "to unlawfully sell it," "conspire to unlawfully transport it," "conspire to unlawfully maintain a nuisance in connection with the liquor traffic at the places set forth in said indictment."

The indictment then charges as follows: "That in pursuance [295] of said conspiracy, combination, confederation and agreement herein in this indictment set out and to effect and accomplish the objects thereof and with intent and for the purpose of effecting and accomplishing the objects thereof, said defendant Patrick Kissane then and there being

a regularly qualified, appointed and acting police officer of the Police Force in the City and County of San Francisco, State of California, did on or about the 17th day of November, 1923, at 1249 Polk Street, in the City and County of San Francisco, in the Southern Division of the Northern District of California and within the jurisdiction of this Court, receive as such police officer, from said defendant George Birdsall, *alias* George Howard, the sum of Five ($5.00) dollars, lawful money of the United States."

There is not any other overt act charged in the indictment against Kissan*e,* save the one that I have just read. There is no evidence that said Kissane did confederate and agree and combine and conspire with the codefendants named to do the unlawful things charged in this indictment. The so-called "Gray Ledger," Government's Exhibit Number Three, was offered in evidence, objected to its introduction upon the grounds that as against Patrick Kissane it was incompetent, irrelevant and immaterial and that no foundation was laid for its introduction; and that there was nothing before the Court to show the unlawful conspiracy or confederation pleaded. There has been no evidence upon which the jury could find a sufficient connection between Patrick Kissane and the codefendants alleged to be in the conspiracy with him, to connect him up with anything happening at 1249 Polk Street, in any matter of a criminal nature. There is no evidence introduced that Patrick Kissane did wilfully, unlawfully, feloniously and knowingly or

otherwise, manufacture, sell, transport, deliver, furnish or have in his possession or that he knew that any of the defendants in said indictment named did wilfully, unlawfully, feloniously and knowingly manufacture, sell, transport, [296] deliver, furnish or have in their possession or that there was in the possession of each or any of them intoxicating liquor for beverage purposes, to wit, whiskey, wine, champagne, gin or beer, containing one-half of one per cent and more of alcohol by volume and fit for use for beverage purposes, in violation of Section Three of Title Two of the Act of October 28th, 1919, known as the National Prohibition Act. There is no evidence before the Court that said defendant Patrick Kissane entered into any conspiracy with any person or persons named in said indictment or otherwise or at all, to do or to effect or to aid or assist in doing any of the acts or any act mentioned and set forth in said indictment.

The COURT.—Motions are denied. [297]

Mr. KELLY.—May we note an exception on behalf of the defendant Gorham?

Mr. TAAFFE.—An exception on behalf of Kissane.

Mr. O'CONNOR.—Let the record show an exception in behalf of the defendant Mahoney.

Mr. SMITH.—Let the record show an exception on behalf of the defendants Marron and Birdsall.

The COURT.—Do you want an exception, Mr. Green.

Mr. GREEN.—No.

(Thereupon the jury returned into court.)

(Testimony of William Hill.)

The COURT.—I believe, Gentlemen, the rule requires a ruling to be made in the presence of the jury on these motions, also. The motions are denied.

Mr. KELLY.—I wish to note an exception in behalf of the defendant Gorham.

The COURT.—An exception may be noted on behalf of all the defendants.

TESTIMONY OF WILLIAM HILL, FOR DEFENDANT WALTER BRAND.

WILLIAM HILL, called on behalf of the defendant Brand, being first duly sworn testified as follows:

My name is William Hill and I live at 1520 California Street. My business is that of an embalmer. I am employed as such by the Golden Gate Undertaking Company and have been employed so for the last two and one-half years. I know the defendant, Walter Brand, who is employed at the Golden Gate Undertaking Company. To my knowledge he has been working there about eight or nine months. He first came to work there sometime in March of last year and was working there in September of last year. His hours of work were from 5:30 to 6 o'clock, sometimes it was seven o'clock, it depended on what kind of work he was doing. To my knowledge he never left before 5:39 and generally about 6. To my knowledge he worked right through September every day, including September 22d.

(Testimony of William Hill.)

I remember [298] the day of September 22d—he worked on that day and trimmed 3 or 4 caskets with me—that is, he helped me. I relieved him at 5:30 generally—I go to supper at 5 and he goes at 6 and comes back at 7:30. On September 22d he left about 6 o'clock and he has been working continuously for the Golden Gate Undertaking Company since March 24th and is working there now.

Cross-examination.

(By Mr. GILLIS.)

On September 22d, 1924, Walter Brand helped me trim 3 or 4 caskets—there is always something to do around an undertaking parlor. I do not particularly remember the day, but generally I do. I have not looked back in the book to determine about September 22d, but I know every day he has worked there—if he was not helping trim caskets he was helping to polish floors, but he was trimming caskets that day. Probably on August 22d he may have been on a funeral, or he may have been trimming caskets, or he may have been going after a body or something like that. I know that he worked on August 22d at the Golden Gate Undertaking Company. I have been with them continuously for the last two and one-half years. On August 22d I worked around the Undertaking Parlor—polished floors and things like that. I have a routine every day that I go through—sometimes trimming caskets—sometimes polishing floors—sometimes helping on funerals.

(Testimony of William Hill.)

Mr. Brand worked all of the day of September 22d, 1924. I do not know what salary Mr. Brand was drawing; I do not know whether he was drawing a salary or not. Besides myself there are employed by the Golden Gate Undertaking Company, Walter Brand, a bookkeeper and Mr. McCurdy. There is also the man and woman who own the firm. Brand sometimes worked for McCurdy, but we generally worked together. On the 22d of September, 1924, he worked with me—I think Mr. McCurdy was on a funeral. The books of the company do not show what we do there every day.

(Rep. Tr., pp. 268 to 273, inc.) [299]

TESTIMONY OF LOTTA McMILLAN, FOR DEFENDANT WALTER BRAND.

LOTTA McMILLAN, called on behalf of the defendant, Walter Brand, being first duly sworn testified as follows:

My name is Lotta McMillan; I live at 701 Sutter Street. I am employed at the Wakefield Hospital, 1065 Sutter Street in this city as Secretary. I have with me the official records of the Wakefield Hospital. The records of the Wakefield Hospital show that the defendant, Walter Brand entered the hospital Sunday, November 18th, 1923, and was discharged from the hospital on November 21st, 1923, and had received treatment during the time that he was there from November 18th to November 21st.

(Testimony of Lotta McMillan.)

Cross-examination.

(By Mr. GILLIS.)

I did not know Mr. Brand when he came in. The same name appearing on our records is the same name as the Walter Brand present here. He was confined in bed for three days while he was there.

(Rep. Tr., pp. 273 to 274.)

TESTIMONY OF LYDA LYDDANE, FOR DEFENDANT WALTER BRAND.

LYDA LYDDANE, a witness called on behalf of the defendant, Walter Brand, being first duly sworn, testified as follows:

My name is Lyda Lyddane and I reside at 1055 Pine Street in this city and county and am employed at the Morton Hospital, 1055 Pine Street in this city and county as assistant office manager. I have with me the official records of that hospital. They consist of a doctor's chart kept by the nurse and the admission card and financial record; they mention the name of Walter Brand and show that Walter Brand entered the Morton Hospital November 21, 1923, and that he left the hospital December 16, 1923. I assume that he was there during all of that time, because if he left the readmission would have been made, and the admission card here does not show any leaving or re-entering. [300]

(Testimony of Lyda Lyddane.)

Cross-examination.

(By Mr. GILLIS.)

I do not know Walter Brand nor did I know him at the time he was in the Morton Hospital.

(Rep. Tr., pp. 275, 276.)

TESTIMONY OF JAMES B. HUGHES, FOR DEFENDANT WALTER BRAND.

A witness called on behalf of the defendant, Walter Brand, being first duly sworn testified as follows:

My name is James B. Hughes and I reside at 3155 16th St. and I am a regularly licensed and practicing physician and surgeon in this city and county and have been such since 1895. I know the defendant, Walter Brand, and he has been a patient of mine. He became a patient of mine in the beginning of November or the latter part of October, 1923—consulted me at that time and I examined and found that he was suffering from a peculiar form of eczema of his hands. He afterwards received hospital attention under my care—first at the Wakefield Hospital where he stayed a few days and left and went to the Morton Hospital, where he remained until sometime in the middle of December. The treatment of this form of eczema required the application of an ointment, special diet and particularly refraining from the use of water on his hands. It was essential that he not immerse his hands in water in that condition. He would

(Testimony of James B. Hughes.)

not be able to wash his hands and I do not very well see how he could keep clean and tend bar. Brand was in bed until some time after the first of the year, 1924, and he was my patient for three or four months afterwards. I have known Walter Brand since 1918 and I know his general reputation in the community in which he lives for truth, honesty and integrity and his reputation are good.

Cross-examination.

(By Mr. GILLIS.)

I have known W. B. Brand since 1918. I do not know what he was doing then. He came under my care as a patient in 1918 because he had the flu. It was during the year of the big epidemic, so that [301] I definitely fix that as the time I first met him and made his acquaintance. The only way I have known Walter Brand is as a patient, and I do not know what his business was from the latter part of October or November, 1923, nor did he tell me what his business was. I know that he lived at 526 or 527 Faxon Avenue. I did not know that he had a place at 1249 Polk Street, nor did he say anything to me about it. His hands were in such a condition that he could not put them in water, he could not use them very well because they were in bad shape. He is the first bartender I ever saw with that form of eczema. It is not a form of eczema from which bartenders suffer a great deal.

(Rep. Tr., pp. 276 to 279.)

TESTIMONY OF WALTER BRAND, IN HIS OWN BEHALF.

WALTER BRAND, called as a witness on his own behalf, being first duly sworn, testified as follows:

My name is Walter Brand and I reside at 527 Faxon Avenue, in the city and county of San Francisco. I kept the premises at 1249 Polk Street in this city and first took possession of these premises on July 26, 1923. I obtained the premises from George Hawkins. Hawkins wanted to go away and a party told me he was not feeling well and wanted to get out of business—so I went to see him. At first he wanted $1500 for the place, but finally came down to $1000 and I bought the place. I have known the defendant Eddie Marron for several years and at the time I bought the place from him I owed him some money—approximately $325. After Hawkins agreed to sell the premises to me for $1000 I asked Marron to loan me the money and he agreed to do this. I then bought from Hawkins the furniture of the 5 rooms at the premises. The premises were not entirely furnished—I put in other furniture afterwards. I gave Hawkins a deposit of $500 which was the first loan I got from Marron and I paid the rest to Hawkins according to our agreement—about [302] 25 days afterwards. I entered on the occupancy of the premises July 26, 1923. I actually resided there and lived there. I had no one working for

(Testimony of Walter Brand.)

me at any time and I have no partner, but run the business independently and alone. I started to pay back to Marron when I was there a little over a month and I think the first I gave him back was $500. Marron used to come to see me once in a while when he would have a few drinks—he would ask me how I was getting along and I would tell him how I was doing, and he asked me what I was doing with the money and I told him I was getting it accumulated every day and he told me to put it in a bank. I told him I did not want to do it. He then told me that he wanted me to put the money in the bank and we had a little wrangle over it, and the next day he came up and said to put it in the bank and any time I wanted any money he would sign a check and if I wanted to pay him any money I would have to do the same thing, but he wanted to account for all the money that was taken in. Subsequent to this I opened a bank account at the Polk Street Branch of the Bank of Italy. During the time I was operating the premises in question defendant Marron never received any profits from the business and received no money except payments on the balance due him, and I would make payments on the $325 that I previously owed him. I do not owe him any money now. During the time, I was occupying the premises, I was selling liquor in violation of the prohibition act.

I had nothing to do with the place in October, 1923. Marron came around there and told me that

(Testimony of Walter Brand.)

I was working alone and he saw the business was doing good, and said he thought he would put Birdsall up there with me and asked me if I knew the man. I told him, no. That night he said, "I think I will put him up here and take the place." That afternoon he brought up a register and I said, "You can take the place." I then asked him to give me the money [303] that was in the bank and he said he would as soon as he saw Farrell, the man who used to make up my books for me. Mr. Farrell was an expert accountant at the Fair of 1915. After this took place I stayed there that night and when I got up in the morning I saw Mr. Birdsall there. Marron then came up and I asked him when he was going to give me the money in the bank and I told him I would see Farrell, and I did get a hold of Farrell that afternoon, but could not find Marron. I then made an engagement with Farrell to be there the next day at three o'clock in the afternoon, and also asked Marron to be there. Farrell was there, but Marron was not. I made an engagement for the next day and was unable to get them there together. I then asked Birdsall to tell Marron that I wanted to see him a few days later at two o'clock because I had an engagement with Farrell, but that meeting did not materialize. It seemed that I could not get them together for about ten or fifteen days —when I finally got them together and we arranged a settlement. In that settlement Marron was paid in full—everything I owed him. We

(Testimony of Walter Brand.)

then settled up the bank account—he gave me my money from the bank and I sold him the ice-box, table, chairs and cuspidors. That was sometime in October or before the first of November, 1923. I then stayed around there a few days, usually being there for about a half hour or so. I wanted to see some people who owed me money, but had nothing to do with the business from that time on, and never served any drinks thereafter. I believe from the settlement I got approximately $125 to $135—the last payment made was one of $25.

Shortly after that, I believe around the middle of October, I went to see Dr. Hughes and he subsequently sent me to the hospital. I first went to the Wakefield Hospital and after being there a few days I went in an ambulance to the Morton Hospital. After I was discharged I went home and went to bed and stayed there a [304] little over a month, which would bring me up to the latter part of January. Then, for a few weeks I was unable to do anything—and could not. After I was able to go out I went to the Golden Gate Undertaking Company where I subsequently obtained employment. Part of my work was to go to the Health Department, put death notices in the paper and go to the coroner's office, and such as that. I never had any cases for two months. I did errands for them. At that time I still felt the effects of my illness. I never participated in the undertaking work of that firm. Trimming caskets and going after cases to the hospital, etc., were

(Testimony of Walter Brand.)

my duties. I was not on the pay-roll of the Golden Gate Undertaking Company, but as compensation I sometimes received $75 or $80, according to how business was. I have been with the Golden Gate Undertaking Company a little over 8 months and I have received from them in all, approximately $400. I am not an embalmer, but am in the apprenticeship as such, and I am still connected with the firm in that capacity. I heard Agent Howard testify here. I never sold any drinks at 1249 Polk Street to Agent Howard on the 22d day of September, 1924, or at any other time, nor was I near 1249 Polk Street on the 22d of September, 1924, and had not been at that place for about a year. I heard the witness Herring testify here—I did not sell witness Herring any drinks at 1249 Polk Street from the 13th of November to the end of November. At that time I was under the doctor's care and from the 16th of November on I was in the hospital. I did not sell the witness Bivens drinks in July, August and September, 1923. I recognize Exhibit 3 of the Government, the book that is now shown me. I had that book in my possession until October of 1923. I made a statement following my arrest to someone in Mr. Oftedal's office, and the statement I made regarding the book is true. I ceased to keep the book in question on the 17th day of October, which is shown at page 29 in the book. The book prior to page 29 was kept by me. When I finished [305] with the book I threw it in the closet in the premises at

(Testimony of Walter Brand.)

1249 Polk Street and did not see it again until it was shown to me in Mr. Oftedal's office. The sums of money I repaid to Mr. Marron on the loans he made me are entered in the book, they are not in my handwriting, but Mr. Farrell put them in there—they are in his handwriting. I made the deposits in the bank account that I have testified to and the last deposit is shown on the statement. I believe it was the one of $107.55 of October 20th. I had nothing to do with the bank account after that date.

Cross-examination.

(By Mr. GILLIS.)

Before I borrowed the $1,000 from Marron I borrowed also $325. The first $500 of the thousand dollar loan that I borrowed of Marron I borrowed on or about July 26, and the other $500 I borrowed sometime during the month, when, I don't exactly know—that would be during the month of August I believe, making a little over $1300 I owed Marron. I do not remember exactly when I paid back the first $500, it must have been in August some time around the time I paid him back this money as Marron would come up to the place once in a while. I did not owe Marron any other money than the $1,300. I did not become indebted to him at that time in any other way. Marron seemed insistent that he get his money and would come and ask me when I was going to pay it. I never made any arrangements with him when I would pay it back, what the money was originally borrowed for,

(Testimony of Walter Brand.)

nor did I tell him what I was going to use it for, and he never asked me what I was going to use it for. I told him I was going to get a place on Polk Street, but not what kind of a place and asked him to come and see me. I was only up there four or five days when he insisted upon my opening a joint bank account. That was in the first part of August. I think that the account was opened sometime in September. He knew the kind of business I was running afterwards because he came up there and bought a few drinks from me. It was [306] around the first of August that he advanced the second $500. This I used to buy stock. Mr. Marron knew all about the kind of a place I was running after I was up there—that was at the time I got the second $500. I guess he knew what I wanted the second $500 for. The second $500 was advanced to make up the original $1,000 loan. I had no talk with him at all when he gave me the second $500—I never discussed stock with Marron and he never said a word about liquor to me, nor, did he state that he would like to sell me some liquor, and I never did buy any liquor from him. I bought the liquor I used from two different persons. I bought it from a man by the name of Carpenter—I didn't know where he lived, but I had his telephone number and when I wanted anything I telephoned him. I got different kinds of liquor from him—Scotch, Bourbon. Marron would probably come to the place about twice a week after the bank account was opened—he would

(Testimony of Walter Brand.)

ask me how I was doing and have a few drinks. I always told him I was doing all right. It was about the first of October when he first broached the subject of taking over the business from me. He told me he wanted to put someone to work there, a man named Birdsall, and he was going to give him charge of the place, and I told him, "All right, he could have it." I made no objections to him putting somebody to work there, because I wanted to get out of the business. It was perfectly agreeable to me if he would put someone else there and give me my money, and let me get out. I think it was approximately October 17th when Birdsall first came there. The next morning after Birdsall arrived I quit and I have never had anything more to do with the place since that time. Marron said he was paying Birdsall, but I never paid Birdsall anything. Birdsall may have taken money out of the business that was being run there. I had nothing to do with it if he did. I never made any complaint about what Birdsall took from the business, I did not know what he was taking, nor did I look at the register, [307] nor did I know what Birdsall was getting. I seldom saw Marron after that, but I tried to get Marron to settle up my account, and is the reason I could not get Marron for 15 days or 16 days. I was up there once a day until that time. After the bookkeeper came and made up the books, and gave Birdsall $20 a day, I told him I could not afford to pay out that money, that was, to be taken out of the money I

(Testimony of Walter Brand.)

had taken in. I did not turn the bank account and the business over to Birdsall the minute he came in—I was waiting for the bookkeeper to come and make up the books. I turned everything over to Marron—stock and everything. I never bought any stock from the time that Birdsall came up there. There must have been more stock put in to run the business, but as to this I could not say. I think I got approximately $82 or $84 for my chairs and tables—that included all the furniture I had in the place. There was a stove in the kitchen when I was there. When we had the division we went to the bank and took the money out of the bank and I got all the money there was in the bank—I think it was approximately $104.06—this amount I kept and that is all that Marron gave me.

Referring to the book on page 20 thereof—the item of the 6th—"Bank of Italy—Walter $150"—scratched off represents money that I took. The item on the 14th—$89.60 and the item Walter $40, and the item Walter Mrs. B. $50 and the item Walter $50; that money is money I drew; the $89.60 is money I was paying on a sedan; the items on page 21 of August 31 marked "Balance after payment of business E. Marron $500 rent $100, W. Brand $500,"—those are items as follows: Paid Marron on account of the $1000 loan and I paid my rent $100, and $500 I took myself and transferred it to where I had the other amount. That was a personal account I drew during the month. On page 31, October 31, "W. Brand $408.99 and E. Marron $603.08,

(Testimony of Walter Brand.)

I can't tell you what exactly that [308] is—it is in the bookkeeper's writing—I know I gave Marron $600 at one time—that is in addition to the $500 that I testified I paid him. Sometime afterwards I gave him $50—that was during the month of September. I gave him $50 in October and later in October settled up the bank account. I have paid him back everything out of the profits of the business that I have conducted. I can't definitely fix the third payment to Marron in the book. I don't think it is in the book.

(Rep. Tr., pp. 283 to 303, inc.)

TESTIMONY OF JULIAN R. BRANDON, FOR DEFENDANT PATRICK KISSANE.

JULIAN R. BRANDON, a witness called on behalf of the defendant Kissane, being first duly sworn, *de*testified as follows:

My name is Julian R. Brandon and I reside at 2529 Polk Street in the city of San Francisco. I am by profession a physician and have practiced for a number of years. I know the defendant Patrick Kissane and have known him between 16 and 18 years. His general reputation in the community in which he resides for truth, honesty and intelligence, and his reputation are very good.

TESTIMONY OF WALTER BRAND, IN HIS OWN BEHALF (RECALLED—CROSS-EXAMINATION).

Cross-examination of WALTER BRAND (Resumed.)

The $50 payments I referred to were not put in the bank—one $50 payment was and the other was not. It was my practice to put in the book just part of the money I had paid back to Marron on the loan—what I mean is, is that the amounts were put in the book by Mr. Farrell, the accountant, and he would add up and audit the book. Mr. Farrell puts the amounts in the book at my request. I did not put the $500 that I paid Marron in the book—I told Farrell to put it in the book. Mr. Farrell made the figures and entries of the pay-roll at page 31 at my request. The figures 8¢ and 3¢ appearing therein I don't know where he got those. I took money myself a lot of times I did not put down. [309]

Some of the money that I paid Marron I did not put down. I did not sell any drinks to Herring on November 13th, or thereafter. I could not say positively whether I waited on him before the 13th. I know who Mr. Herring is; he had a bakery right on the corner from me—I do not believe that he was in my place before November 13th, but I am not positive. He did not come to my place as far as I remember when I was there. I don't remember him. It is hard to say how many people I would serve a day—a lot of people had keys to go up to the place and help themselves and lay the money down when

(Testimony of Walter Brand.)

I was not there. I kept the liquor in the closet. Sometimes I would lock it—none of my customers had keys to the closet. I could not tell how many people came in there in a day—it may have been 20 or 30—maybe more. In the evening, maybe 10 or 12. I had a little crowd of people coming in and out all the time. I never made much money there myself, I paid the borrowed money out of the business. I charged 50¢ for drinks, either Scotch or Bourbon, and sometimes I made highballs. I lived at 1249 Polk Street all the time I was there, but I had another residence at my home, 527 *Gaxon* Avenue, where my wife resides. I did not figure 1249 Polk Street as my home, but would stay there when I could not get a car home at night-time. I generally kept open until twelve and one o'clock, sometimes I stayed until two thirty and took the last car home. I seldom kept open after two thirty.

Redirect Examination.

(By Mr. GREEN.)

I was kept pretty busy at 1249 Polk Street, because I did all the work myself. When the settlement was made with Marron, Farrell attended to it and made the settlement. I left everything to him. All the money I had borrowed from Marron was taken care of at this settlement, and the entries in the book of moneys paid to Marron were made by Mr. Farrell. At the time Marron was going [310] to take the place over and put Birdsall there to run it, I was not very well physically, nor was

(Testimony of Walter Brand.)

I in any condition to fight with Marron about anything—all I wanted was to get out; I just wanted to square up my debts and move out, and I never went back. Neither Marron or Birdsall, nor Mahoney, nor any other defendant in this case was ever a partner of mine. I was an independent bootlegger. I got my liquor in in the evening through the front door, that is, the entrance on Polk Street—that was the only entrance to the place. There was a street light on the corner about 30 or 35 feet away—an ordinary lamp-post. I do not know how many times a week deliveries of liquor were made; I did not keep very much stock on hand, and I would get it just as I needed it. Sometimes it would be three times a week and they were usually made around eight or nine o'clock at night. The liquor would be delivered or brought up in suitcases.

I did not quit the business because Birdsall was going to be paid $20 a day; I did not care how much Birdsall was getting—I wanted to get out of the business. Anybody could have had the business that wanted it. In accordance with the statement at the time of my arrest, I did ask Marron about paying Birdsall $20 a day—he told me he was going to give him $20 a day, and I didn't care what he gave him, but I didn't think he was going to take it out of my money. I thought it was too much to give him. Marron intended to take it out of my receipts. I did not find out that Birdsall was going to get any salary until Farrall told me that Marron was paying him $20 a day. I quit the

(Testimony of Walter Brand.)
place the next morning after Marron told me he was going to put Birdsall in charge, and that was the first time he had mentioned taking over the place. [311]

TESTIMONY OF PATRICK KISSANE, IN HIS OWN BEHALF.

PATRICK KISSANE, a witness called in his own behalf, and sworn, testified as follows:

Direct Examination.

(By Mr. TAAFFE.)

Mr. TAAFFE.—Mr. Gillis, will it be stipulated that this book which was introduced in evidence and marked Government's Exhibit 3 has been in the hands of the Government officials since the 2d of October, 1924?

Mr. GILLIS.—What is the purpose of the stipulation?

Mr. TAAFFE.—Do you wish to so stipulate?

Mr. GILLIS.—I want to know the purpose of your stipulation. If it is to throw some insinuation against Government officials, I do not know that I want to stipulate as to anything—if that is the purpose of the stipulation—if it is not, if you make it known to the Court, maybe we can agree.

Mr. TAAFFE.—The purpose of the stipulation is this, that there has been a change in this book.

The COURT.—You mean a change as between "Police" and "Policy"?

Mr. TAAFFE.—Yes, and it was for the purpose

(Testimony of Patrick Kissane.)

of ascertaining whether or not the Government was going to charge that change as against these defendants, or not.

The COURT.—I think the stipulation is proper, in view of that.

Mr. GILLIS.—If that is all you want the stipulation for, it is perfectly agreeable to me.

Mr. TAAFFE.—Then it is stipulated that this book, Government Exhibit 3, has been in the hands of the Government officials, or under the control of the Government, at any rate, since the raid on the 2d of October, 1924?

Mr. GILLIS.—That is correct. [312]

Mr. TAAFFE.—That is all I want.

The WITNESS.—My name is Patrick Kissane. I reside at 130 21st Avenue. I am a police officer, under suspension. I have been a police officer, actually engaged as such, prior to my suspension, for 27 years. During that period of time I was engaged as a police officer in the City and County of San Francisco continuously. During that period I have acted under different captains in different sections of the city. On the 3d of October, 1924, I was assigned to the Bush Street Station, District No. 5. Prior to this assignment I had been there about 18 years. I had particular streets or beats designated that I was to cover on that assignment. I was assigned to Polk and Larkin from Sutter to Broadway. It would be about approximately 18 blocks, nine blocks to each street. I had to patrol the boat, and I had to do

(Testimony of Patrick Kissane.)

the crossing duty at the schools for about three or four hours of the day. My watch was from 8 in the morning—8 A. M. to 4 P. M.; 8 hours. I had what is designated as the day watch. The watches are split up in eight hours, making three squads in 24, patrolling that beat. I went on at eight o'clock in the morning ready for duty. My activities from thence on until 8 o'clock under this assignment were that I went on the street—my first duties were to attend to the schools from half-past eight to half-past nine, and then I did other work until half-past two. From 12 until one I was also on a crossing for the safety of school children crossing the street, and then again at half-past two to half-past three I was on a crossing. My assignment was for eight hours on those 18 blocks. I was to patrol those eighteen blocks in addition to that detail, with the exception of Saturdays, I was at the crossing or in front of the school for the protection of children at the crossing [313] of Pine and Polk Streets from 8 to 9, and from 12 to 1, from half-past 2 to half-past 3. There were three hours of my assignment of eight that I had to patrol the streets of 18 blocks in which I was stationed at a particular place. We also had to make investigations on burglary reports, robberies, and various other duties we had to attend to. There are many places of business on blocks that were assigned to me. Polk Street from Sutter to Broadway is all stores almost. There are other places than general stores; there are garages; we

(Testimony of Patrick Kissane.)

have banks there, and machine-shops. Under my assignment it was necessary to visit these garages and machine-shops. We had to be on watch for lost or stolen machines, to get a report from the owner of the garage. It would consume some time at intervals for the purpose of looking over machines that were in the garage at those particular institutions. For the purpose of doing other work that was assigned to me, it was necessary for me to accomplish it all in a period of five hours, because there were three hours in it in which I had to attend to school children. If there were any investigations to be made they were to come out of the five hours of service on the streets. Most of the time I was assigned from—well, it was a detail from Sutter to Market—the regular man on there used to, as we used to call it, be floating, where he would take in other beats, be detailed on other beats, and I used to take in the full length of Polk and Larkin, from Broadway to Market. It embraced a greater expanse than between Sutter and Broadway. I would have to patrol the beat. I would walk down one street and back the other. I was supposed to keep moving all the time, unless something attracted my attention, and if anything turned up I would have to stop, but in the event that nothing turned up I would keep patrolling. I would have the detail probably three or four times [314] a week, to cover the beat from Sutter to Market Street, on Polk and Larkin. I patrolled the full length from Broadway to Mar-

(Testimony of Patrick Kissane.)

ket Street myself. My regular beat was Sutter Street to Broadway, but sometimes when the regular officer was away, I would also cover, in addition to covering his regular beat, the beat from Sutter to Market Street. If anything unusual happened upon my beat, I was supposed, under my instructions, to render a report to my superior officer. During the time that I was assigned to this beat from what is called the Bush Street Station, designated as Station No. 5, I was requested to visit the premises at 1249 Polk Street. I am familiar with those premises, and I visited them. On my visits to these premises I did have a conversation with one of the defendants that is here present in court. I had a conversation with George Birdsall. I saw Mahoney and Marron. I didn't see much of Marron. I never received money from George Birdsall, one of the defendants, on the 17th day of November, 1923, or at any other time, or at all, or from anyone else connected with that place, 1249 Polk Street. I didn't know on the 17th day of November, or any other time, that liquor was being sold on those premises. I didn't ever see anyone drinking liquor upon those premises. I didn't ever see any liquor upon those premises. I didn't, during my patroling of my beat, on the streets, at 1249 Polk Street, in this city and county, see anyone go into these premises with any liquor. I never at any time procured any person or aided or assisted anyone to bring into those premises any intoxicating liquor, or any li-

(Testimony of Patrick Kissane.)

quor of any kind or character. I have never by any act aided or assisted George Hawkins in violating the Prohibition Act at 1249 Polk Street, this city. I have never aided or assisted or conspired with Walter Brand to violate the Prohibition Act, or protected Hawkins or Brand in the [315] violation of the act. I never rendered to them any protection of any kind or character. I never aided or assisted Marron—Joseph E. Marron, *alias* Eddie Marron, to violate the Prohibition Act, or any act whatsoever, or any law, at the premises. I never aided or assisted George Birdsall either. After I made an investigation at those places I would leave there. I would not make any report to anyone with reference to the places, not all of the time. On some occasions I have rendered a report. Those reports are written reports. They were rendeed to my captain. I heard the reports read in evidence yesterday with reference to my visits to those premises. (The attention of the witness was then directed to Government Exhibit 34.) I have seen that report before. It is in my handwriting, and signed by me on the 11th of October, the date it bears. In addition to this report, Government's Exhibit 34, I rendered other reports to my captain with reference to the activities at this place. They were rendered under circumstances similar to the circumstances that caused the rendering of those other reports. On the 17th day of November, 1923, I did not receive from any one of the defendants in this action the

(Testimony of Patrick Kissane.)

sum of $5, or from any person at 1249 Polk Street. (The attention of the witness was then directed to a paper designated as a list.) I never at any time or on any occasion, as indicated on this paper, which is a copy from the gray ledger, receive from George Hawkins, Walter Brand, Joseph E. Marron, *alias* Eddie Marron, George Birdsall, *alias* George Howard, Charles Mahoney, or any person or persons, in any manner, shape or form, or from any person in connection with these premises at 1249 Polk Street, any moneys for any purpose whatsoever. I never saw, while patrolling this beat, and while in the neighborhood of 1249 Polk Street, a crowd or congregation there going into or coming out of those premises. [316] I have not at any time at those premises seen any deliveries of any kind or character being made. My duties as a police officer did not call me to Polk Street, and especially to 1249 Polk Street, at any other time of the day or night other than the assignment from eight o'clock in the morning until four o'clock in the afternoon. Sometimes there might be wagons standing in front of 1249 Polk Street during the time that I was patrolling my beat. I could not say what character of wagons they were from what I observed. I never noticed what they were, but there were wagons in front of there, of course, and machines. I did not at any time see any delivery from the wagons or automobiles that were then in front of these premises, into these premises. On each occasion that

(Testimony of Patrick Kissane.)

a request was made to me, I visited the premises, and was admitted. The door leading up to the flat at 1249 Polk Street is just as you step off the sidewalk—the door is right on the sidewalk, you step up just one step, and in order to gain entrance you have to ring a bell. And, of course, you have to stand until you are admitted, one minute, or two minutes, or three minutes, probably longer. Then you go up a flight of stairs, up to the flat proper. It was not a glass door. It is opened by the man standing up at the head of the stairs, by a lever. I never counted how many steps it would be necessary for me to ascend before I would be on the second floor. I never counted them. It is pretty high up, a long flight of stairs, a second story flat. Upon the occasion of my visits to these premises, I was in the uniform of a police officer.

(R. Tr. Vol. —, pp. 312–323, inc.) [317]

TESTIMONY OF HARRY BERNSTEIN, FOR THE DEFENDANT PATRICK KISSANE.

HARRY BERNSTEIN, a witness called for the defendant Kissane, and sworn, testified as follows:

Direct Examination.

(By Mr. TAAFFE.)

My name is Harry Bernstein. I reside at 1505 Gough Street. My occupation is proprietor of a furnishing goods store at 1254 Polk Street. I have been in business about twelve years at that cor-

(Testimony of Harry Bernstein.)

ner. I know the defendant Patrick Kissane and have known him for a period of twelve years, during which time I have come in contact with and have seen him frequently, and I am prepared to testify as to his general reputation in the community in which he resides for truth, honesty and integrity. To my knowledge it has never been known otherwise to me than good.

(R. Tr., p. 324.)

TESTIMONY OF FRANK W. LUCIER, FOR THE DEFENDANT PATRICK KISSANE.

FRANK W. LUCIER, a witness called for the fendant Patrick Kissane and sworn, testified as follows:

Direct Examination.

(By Mr. TAAFFE.)

My name is Frank W. Lucier. I reside at 930 Judah Street, San Francisco. My occupation is that of a shoe dealer. My business is located at 1323 Polk Street. I have been engaged in business at that location for four years. Previous thereto I had been engaged in a similar business at 151 Post Street. I know the defendant in this case, Mr. Patrick Kissane, very well and have known him for about twenty-five years. During that time I have come in contact with him frequently and I have seen him frequently and I am prepared to state of my own knowledge what his general reputation in the community in which he

(Testimony of William K. Latham.)
resides is for truth, honesty and integrity, [318]
and I would say that it was very good.

(R. Tr., p. 325.)

TESTIMONY OF WILLIAM K. LATHAM, FOR THE DEFENDANT PATRICK KISSANE.

WILLIAM K. LATHAM, a witness called for the defendant Patrick Kissane and sworn, testified as follows:

Direct Examination.

(By Mr. TAAFFE.)

My name is William K. Latham. I live at 1487 Pine Street, San Francisco. My business is stationery and book business at 1515 Polk Street. I have been in that particular location for fifteen years, during which time I should judge I have known Patrick Kissane for fourteen years. During that period I have seen him frequently and came in contact with him, and from my observation I am prepared to say what his general reputation is in the community in which he resides for truth, honesty and integrity. Of my own knowledge I know that his reputation for truth, honesty and integrity is good.

Cross-examination.

(By Mr. GILLIS.)

Mr. GILLIS.—Q. Did you ever visit 1249 Polk Street?

Mr. SMITH.—That is objected to.

(Testimony of William K. Latham.)

The WITNESS.—Your Honor, I did not come here to testify to that.

The COURT.—I do not think that has anything to do with Mr. Kissane's reputation.

Mr. GILLIS.—A matter of interest, may it please the Court, it may develop that this man has seen some one of the defendants in [319] there.

The COURT.—I will permit you to ask him whether he ever saw Mr. Kissane there, but I do not think farther than that you ought to go.

Mr. GILLIS.—It seems to me that if the defendant has produced this witness here, who is here as a character witness to testify as to the good character of one of the defendants, who is accused of going into that place, which the prosecution is endeavoring to show was a bootlegging place, that certainly would have weight upon the testimony of this individual, in establishing the character of the particular defendant.

The COURT.—I will sustain the objection.

Mr. TAAFFE.—We might apply the same rule to Mr. Gillis—

The COURT.—I have sustained the objection, Mr. Taaffe.

Mr. GILLIS.—Q. Have you ever seen Mr. Kissane in there? A. No, sir, I never did.

Mr. GILLIS.—That is all.

(R. Tr., pp. 325–327.)

TESTIMONY OF T. C. PRIOR, FOR THE DEFENDANT PATRICK KISSANE.

T. C. PRIOR, a witness called for the defendant Patrick Kissane and sworn, testified as follows:

Direct Examination.

(By Mr. TAAFFE.)

My name is T. C. Prior. I reside at 1326 Larkin Street and by occupation I am superintendent of the Olympic Salt Water Company and have been so engaged for a period of sixteen years. I have known Patrick Kissane, the defendant, for a long period of time—about twenty-five years, during which period I have seen him very frequently [320] and I am prepared from my observation of him to say what his general reputation is in this community for truth, honesty and integrity, which is very good.

(R. Tr., p. 327.)

TESTIMONY OF DAVID BIRNBAUM, FOR THE DEFENDANT PATRICK KISSANE.

DAVID BIRNBAUM, a witness called for the defendant Patrick Kissane and sworn, testified as follows:

Direct Examination.

(By Mr. TAAFFE.)

My name is David Birnbaum. I reside at 1246 Ninth Avenue, San Francisco. My occupation is that of a marketman. I have two markets, one

(Testimony of David Birnbaum.)

at 1236 Polk Street and one at 1726 Polk Street. I have been in the market business all my life, San Francisco about thirty years. I know the defendant Patrick Kissane and have known him for twenty years, during which period I have seen him frequently and I am prepared to say what his general reputation is in the community in which he resides for truth, honesty and integrity, which is very good.

(R. Tr., p. 328.)

TESTIMONY OF WILLIAM BEAUBIEN, FOR THE DEFENDANT PATRICK KISSANE.

WILLIAM BEAUBIEN, a witness called for the defendant Patrick Kissane and sworn, testified as follows:

Direct Examination.

(By Mr. TAAFFE.)

My name is William Beaubien. I live at 1716 Polk Street, [321] San Francisco. My occupation is that of a cigar and tobacco dealer. I have been engaged in that business in that particular place two years, which particular place is 1331 Polk Street, and I know the defendant in this case, Patrick Kissane, very well. I have known him at least eleven or twelve years, during which time I have seen him frequently, and I am prepared to say what his general reputation is in this community for truth, honesty and integrity, which is very good.

(R. Tr., pp. 328–329.)

TESTIMONY OF PATRICK KISSANE, IN HIS OWN BEHALF (RESUMED).

Direct Examination.

(By Mr. TAAFFE.)

I reside at 130 21st Avenue with my wife and daughter. In the course of my duties as a patrolman on the beat assigned to me it is necessary for me to call upon several business houses. In addition to calling upon the business houses and the time for remaining at crossings for the protection of school children, I had to call into the police station at times, and in addition I rang in to the police station every two hours from a box at Polk and Sacramento Streets. I did these things under orders from my superior. The reason I would sometimes call in personally to the station or ring in from a box was that if the regular men on the inside were in court or on some special business detailed somewhere, I would go in and take their place at the station until they would come back. When I would ring into the station, I would be told to come into the station. When that happened, I would be off the street then sometimes for an hour, sometimes [322] two hours. The person on duty in the station would go with the patrol wagon to whatever locality it would be called, and if a fire broke out in the district the patrol wagon had to respond to the fire, together with the station keeper. It was then my duty to take the place of the man detailed on the patrol

(Testimony of Patrick Kissane.)

wagon. The station keeper is the commanding officer. He is not a regular police officer. A lieutenant is in charge of the station. On the day watch there is a sergeant acting as lieutenant, and we take our orders from him. He gets his orders from the captain. The man doing station duty would accompany the patrol wagon and would be gone probably the length of time that the patrol wagon would be gone at a fire or accident.

Cross-examination.

(By Mr. GILLIS.)

The first time I ever saw Mr. Marron in this case was some time around June or July of 1923, I am not sure about the date, and I have known him since that time. I first met Mr. Birdsall after I met Mr. Marron in 1923. I met him at 1249 Polk Street. Prior to that time I just knew about him. That was all. I knew who he was. I would not say I knew where he worked. I knew what his business was, but I didn't really know where he worked. I have known Mr. Mahoney not very long. I don't think I ever spoke to him when he came on the street. I have known him since shortly after the time I met Marron and Birdsall. There was not much difference as to time. I know Mr. Brand. I met him at 1249 Polk Street. It was just about the time, a little before Marron came along, not very long, some time in the fall of 1923. I met Mr. Brand up at 1249 Polk Street, inside, at the head of the stairs. I rang the bell

(Testimony of Patrick Kissane.)

and went in. I would not be admitted without ringing the bell. I went inside and upstairs. I could not say that I introduced myself to Mr. Brand. I don't know exactly what [323] was said. It is a long time ago. But I probably asked him what his business was and what he was doing; I asked him, I believe, if he was bootlegging and he denied that he was bootlegging. This conversation took place at the head of the stairs. I think I asked him if he was living there, and I really couldn't tell you what he told me. This conversation took place in 1923, but I would not know what date or what month it was. It was maybe around July or August, I could not be sure about it. I didn't keep any dates on those fellows when I met them. The first time I went into 1249 Polk Street there were other people living there. It was a flat. They were living there when I went in there. It was a regular home. There was not any business in there. The man that owned the American Florist was there for years and there was not any indication of any business then. There was no suspicion of bootlegging there at all. The first suspicion of bootlegging that I had was when Hawkins was there. I made a report to that effect, that it was suspected as a bootlegging place. When Brand came there I still had that suspicion that it was a bootlegging joint. That was one of the things that induced me to go in when Brand was there, to see. I went in there to make such visits then. The first time I went in and saw Brand I didn't

(Testimony of Patrick Kissane.)

think that I had ever met him before. I didn't meet him before he was there. I asked him what kind of business he was doing there. I asked him, and he denied it, of course. He didn't say he was doing any business there at all. I would not be sure what he said about living there. That is quite a long while ago. I can't recall the words, what the conversation was, but I know that I must have asked him if he was bootlegging. He did not take me into any of the rooms to look around the flat. I walked around myself. I don't know whether I went into the front room or whether he took me. I don't know anything, because that is too long ago. I may have walked in the rooms, and I may not,—the [324] chances are I did walk around. I would not say whether I went through all the rooms. I really don't know how long it was after that I first met Brand. I could not really tell. I could not tell whether it was the same week or the next week, and I would not say it would be a month, but I kinda think, if I remember right, Marron was around there shortly after that time. I would not say, I really don't know, whether Brand lived there or not. As to my conclusion whether he lived there or whether he was conducting a business there, I will say I suspected he was bootlegging there, and I went away with that suspicion, and I had that suspicion when I went back the next time. I did not see anybody else there the first time besides Brand. Before I saw Brand I saw Hawkins there. When

(Testimony of Patrick Kissane.)

I first met Brand I saw nobody else there. I don't think so. I could not tell what time of day it was that I first went in. It would be on my regular watch. My watch is from 8 to 4, and I was continuously on that watch during 1923 and 1924 except when I was away on my vacation or I was sick. When I was on duty I was always on the day watch. I first met Marron in there, and I did not know him before I met him at 1249 Polk Street. I believe that Brand was there at that time. I do not know whether Brand introduced me to Marron, I could not tell you, and I do not know whether I had a talk with him the first time or not. I think I first met Marron at the head of the stairs. He might have been the man that pulled the lever that opened the door to admit me. I would not be sure about it. I think I met Brand and Marron together at the head of the stairs, but I would not be sure about it now. I do not think I had a conversation with the two of them. I think I asked Marron at that time what his business was, if he was bootlegging, and he denied it, and then I had not seen Marron for quite a while after that. Marron was never around. Marron denied he was bootlegging there, and I believe he said he was [325] connected with that place. I would not be sure about what he said about running some kind of a business there. I don't think he said he lived there. Really I don't know what he said, whether he offered any excuse as to why he was there. That

(Testimony of Patrick Kissane.)

is too long ago to go back and think what was said at that time. I suspected it was bootlegging, and when I went in I asked them if it was a bootlegging joint. I asked him if he was bootlegging. He denied that he was bootlegging. I asked him if he was living there, and I believe he said he was, or somebody lived there, I don't know. Brand said he was living there. I probably thought the two men were living there. I don't really know. I believe I walked around the rooms. I went through different rooms to see that everything was all right, and everything looked all right. There was no evidence of anything that I could see. I did not see anybody else in there. I did not see any evidence of any violation of the law there. There was no evidence of any liquor there at all. I did go into the kitchen. I don't know if I really did go into the kitchen, I would not be sure about that. I was looking around and I probably did go into the kitchen and out into the back porch. The next time I went in there after I met Marron with Brand might have been in the next week. I would not be sure about it. At that time I did not go into the place twice a week. I did not go in so often. I started going in twice a week probably way over a year or more ago, about a year from last October. It was probably in the neighborhood of October or November of 1923 when I started going in there twice a week. When I started to make these visits twice a week, I saw George Birdsall.

(Testimony of Patrick Kissane.)

It might have been in October when I first saw Birdsall. I could not tell you the month,—it may have been October. I am not sure about the date. The best way to get close to that would be to have my reports that I made. The report I made was October 11, 1924, and in [326] that report I said I had been going in there twice a week for over a year, and that would throw it back around October, 1923, that I started going in there twice a week. I figure it out that way. I first met Birdsall in October or November of 1923. It might have been longer than that, I don't know. I knew who Mr. Birdsall was before I saw him there. I just knew who he was, that was all. I knew what his business was before that. When I saw Birdsall in there Mr. Brand had left.

Q. Did you see Mr. Marron?

A. Yes, Mr. Marron was around there—Mr. Marron never—

Q. Just answer my questions.

Mr. TAAFFE.—Of course, the witness has a right to explain any answer to any question.

Mr. GILLIS.—He certainly has.

The COURT.—Let him finish his answer.

A. Marron never came around there at all—he just made calls.

Q. He just called occasionally?

A. I guess so. [327] He just called occasionally. I would not say that Mr. Marron was there the first time I went in there and saw Birdsall. I kind of

(Testimony of Patrick Kissane.)

think Birdsall was alone. I would not be sure about that. I kind of think Mr. Birdsall answered the bell himself. I went upstairs; he knew me; I believe he called me by name. I called him by name. I had a talk with him. I asked him what he was doing there. He said he was living there. I asked him, as the place was suspected, if he was bootlegging, and he denied it. He said he was living there. I don't think he said Mr. Marron was living there. I don't know whether he did or not. I didn't ask him what became of Brand. I believe he told me he was working for Marron. I would not be sure about that, either, what he did say. That is my best recollection. I told him the place was suspected of bootlegging, that I would like to look around and make sure, and I looked around. I went through the rooms to see if there was any bootlegging there. I would not say I went through all the rooms on that occasion. To the best of my recollection I looked around, of course. I probably went out into the kitchen and on the back porch. I saw no evidence of liquor there at that time. I don't think there was anyone else in the place at that time. I first saw Mahoney there a short time. I really cannot tell you how long after Birdsall came there; it might be a month, or it might be less; I don't know; it might have been more; I really could not tell you. The first time I met Mr. Mahoney he answered the bell and opened the door and admitted me. I walked in and upstairs. I had a talk with him. I asked him

(Testimony of Patrick Kissane.)

what he was doing there. I believe he said he was working there. I would not be sure that he said what he was doing. I probably asked him. He may have said that he was bartender, but I would not really say he did say that. He probably said he was bartender. I don't [328] think I saw Mr. Birdsall there on that occasion. I told Mr. Mahoney the place was suspected of bootlegging. If I remember I think I told him that if I could get any evidence around there there would be somebody get arrested. I made a remark similar to that. He didn't make a remark like that. I would not be really sure of what he said in answer to that, but I kind of think that he said, "Well, you talk to the boss, don't be talking to me," or some remark like that. I told him I would like to look around the place. I walked in and looked around. The doors were open, nothing to hinder me from going through. I don't think I went out in the kitchen or on the back porch. I may have. Sometimes I would go through the whole place, and at other times I might stand and look around—if there was anybody in there, stand and look around the rooms; I would not say I went on the porch every time I went in there. Sometimes I went into the kitchen and out on the porch, and sometimes I did not—I don't believe I ever went out on the back porch. I went to the door and looked out. There is nothing on the back porch, nothing there but a lot of boxes and stuff. There were boxes out there. I could not tell you what kind of boxes they were.

(Testimony of Patrick Kissane.)

There was a lot of rubbish and stuff out there. When I got through my visit to the place the first time I saw Mahoney there, I didn't see any evidence of liquor at all. I saw nothing out of the way at all. I would not say that I started at that time going in there on an average of twice a week; about that time probably. On each of these visits when I went in twice a week I would walk around, and sometimes I would go into a room that was in front when you come up to the landing at the head of the stairs, go in there and look around. Most of the time I believe I walked through pretty near all the rooms. The last time I was in there might have been a few days before the place was [329] raided on the last time, on October 3d. I don't know how long. I don't remember. I believe I saw Mahoney there on that occasion. I don't recall that I met anybody else at that time. I didn't have a talk with Mahoney. We didn't have any conversation I don't think. I used to go in there and walk around and look around the rooms, and he would be around there, and I would walk out. I might say, "Good morning," or something like that. On these visits that I made I don't think I met Marron in there more than two or three times in the whole time. Birdsall used to be there. Sometimes he would be there when Mahoney was there. Once in a great while the two of them were together when I went there, but as a rule Mahoney was there on the day watch, and Birdsall on the

(Testimony of Patrick Kissane.)

night watch, I guess. Each time I went there I inspected some portion of the premises.

Q. When was it you came to the conclusion that Birdsall did not live there? A. Well—

Mr. SMITH.—That is objected to on the ground that it is assuming something that is not in evidence, and also calling for the conclusion of the witness.

The COURT.—If he never did come to that conclusion he can answer that way. You may answer.

Mr. SMITH.—Exception.

The WITNESS.—(Continuing.) I really don't know whether Birdsall lived there. I was never there at night-time, so I could not say. Birdsall told me that he lived there. He told me the first time I met him there. He told me that was his flat and he was living there. I won't say if Marron told me he was living there or not. I think Brand told me he was living there. Mahoney never said he was living there. [330]

Q. When you talked to Mr. Birdsall and he said he lived there, did you believe that he lived there then?

Mr. SMITH.—That is calling for the conclusion and opinion of the witness and is objected to on that ground.

The COURT.—Overruled.

Mr. SMITH.—Note an exception.

A. I really didn't know whether he was living there or not.

Mr. GILLIS.—Q. What do you believe about it?

(Testimony of Patrick Kissane.)

Mr. SMITH.—That is objected to on the same ground.

Mr. GILLIS.—Q. What do you think about it?

The COURT.—Same ruling.

Mr. SMITH.—Exception.

A. I don't know what I did think about it. To tell you the truth about it, I think I thought he was not living there.

Mr. SMITH.—He thought he was not living there —I ask that that go out.

The WITNESS.—(Continuing.) I thought he was not. I didn't know that he was there or not, because I was never there at night-time. I don't know whether I believed him or not when he said he lived there. I would not say I didn't believe that he didn't live there. I don't think I did believe him. I don't know that I didn't believe Brand when he said that he lived there. I could not tell you. I don't remember whether I believed his statement or not. That is going back, Brand is too far back. I don't really know what Brand said, but I know the other party lived there, that I know. By "the other "party" I mean Hawkins. When Birdsall said he lived there I was inclined to believe him. When I went through this place I saw a table and chairs in each room, and there was a couch, I believe, in one room, and some kind of, I think it [331] was, a davenport, or something, in the other. Now then, going into the kitchen, there was a stove in the kitchen at that time. That would be about a year ago, in the first part of 1924, I guess. At

(Testimony of Patrick Kissane.)

that time there was a stove in the kitchen, a toilet there, of course, and a sink, and a little shelving for dishes, I suppose, if I remember right. I would not be sure about a cupboard, but I believe there was. I would not say that I saw any cooking there. I didn't see any dishes there. I would not say about the dishes; there might have been dishes at that time; I would not say. The stove was there. I didn't see any cooking going on, I would not say that I did when I was in there. I didn't see any women folks around the house. I may have seen old empty bottles thrown around. I could not tell you what kind of bottles; they might have been wine bottles; not very many. I think I picked them up, but it was useless to me because I lost my sense of smell so I could not smell what they were. I lost my sense of smell probably four or five years ago. The bottles were empty, not any dregs in them at all. I could not really recall how many bottles, but I know there were some. I may have remembered if they were whiskey or gin bottles, with labels on, but I don't think they were gin bottles; they were wine bottles. I don't think they had a label on them. I think they were unlabeled and empty. Nothing came out of them. I would not really say how many there were. There might have been two or three; no more than that, I would not think so. I saw glasses around. I believe they were whiskey glasses; not very many; I don't think; maybe a dozen. There might have been some highball glasses there, too. I would not say I remember seeing any

(Testimony of Patrick Kissane.)

wine glasses; there might have been wine glasses there. [332] That was in January, the first part of the year, 1924. It might be around that time. I might have been there a few days before October 3, 1924, just prior to the last time the place was raided. I didn't see anything there any more than before, on that occasion. I didn't see Mr. Birdsall there. I saw Mr. Mahoney; he admitted me into the house. I don't think I did say anything to him. I told him why I had come around. I didn't say anything to him, I don't think. Probably I said I was passing by and was looking around the place. He knew what I was in there for, making these calls. I guess I probably said, "How do you do," or something or another. I can't recall what I said to him. I don't know what he replied to me. I went through the premises. I saw nothing more than I did before. I went into the front room. I can't say what time of day it was. It must have been in the forenoon; I would not be sure whether it was in the forenoon or afternoon. I don't think I saw anybody else in there besides Mahoney. I believe I saw the same tables there as I had seen on previous occasions in the room. These tables were in every room besides the kitchen. I think I went in the kitchen at that time. The stove was not there. Everything was in the kitchen, I believe, with the exception of the stove; the stove was gone. I glanced at the back porch. When I went into the front room I didn't see any slot machine in that place. I have never seen a slot machine in the

(Testimony of Patrick Kissane.)

place. I would positively say that there were no slot machines in that place. I didn't see any. If there had been slot machines there I think I would have seen them. I was not looking for slot machines or things of that kind. I was looking for evidence of violation of the law. When I went through the rooms I looked around to see if there was any violation of the law. If I had seen [333] any slot machine I'd know there was a violation of law.

Mr. TAAFFE.—I call your Honor's attention to the fact that it is not a violation of the law to possess a slot machine. It is a violation of the law to have them in a public community. There is a misstatement of what the law is, because you can possess any of these articles as long as they are not used by the public. It is not a crime to possess one.

The COURT.—But it is proper cross-examination in any event, Mr. Taaffe, with regard to the contents and circumstances of the place. I will overrule it.

Mr. TAAFFE.—But he says—

The COURT.—I suppose that if a man had a slot machine in his room it would not be any violation of the law; that is probably so.

Mr. TAAFFE.—That is just the objectionable part of Mr. Gillis' question.

The COURT.—But it is for the jury to say what the character of this place was, whether it was resorted to by the public, or any considerable portion of it, and if there were slot machines, what they were there for. I will overrule the objection.

(Testimony of Patrick Kissane.)

Mr. TAAFFE.—We note an exception.

The WITNESS.—(Continuing.) I don't remember having seen anyone else there besides Mr. Mahoney. I really could not tell you whether I saw any patrons in the place or not. That was last September. On some of my calls up there there were sometimes one or two men there. There was not any more than two men at any one time when I went into the place. The last call I made in September I saw no one, to the best of my recollection, at that time, except Mahoney. I went back into the kitchen and saw the stove was gone. There was a cash [334] register in the kitchen and glasses. They looked to me like whiskey glasses. I don't remember if they were highball glasses. They were clean; they seemed so to me; I don't know; they all looked clean to me. I saw empty bottles. I would not say that I saw any bottles there on the last occasion, on the last call that I made in September; I don't know; I would not say that I did. I may have, but I don't remember. I don't think that I saw any whiskey or gin bottles. I went there to get evidence. If I saw whiskey or gin bottles I considered that that might have assisted me in getting evidence, and there might be liquor in them. I don't think I saw any whiskey or gin bottles. If I remember rightly, there were a few bottles; I think they were wine bottles. The occasion that I saw the wine bottles is some time ago, probably along the first part of the year. In September, I think, probably there might be some wine bottles on the floor; I would not

(Testimony of Patrick Kissane.)

be sure. I would not be sure if I saw any. I don't think I examined any of the bottles at that time. When I glanced out on the back porch I saw a lot of old boxes and stuff, a lot of old boxes and bottles, I believe. There was a mixture of all kinds of bottles. There might be some whiskey bottles in them, gin bottles; I would not say about champagne bottles. I saw empty bottles out there. I didn't examine them. I don't think there were any labels sticking around where I could see them. I would not say if there was any gin bottles or not. I saw the shape and form of the bottles. It was a round bottle. It could be a whiskey bottle, it could be a wine bottle, it could be a bottle that is ordinarily used to contain whiskey. I know what an ordinary whiskey bottle is. It could be one of these ordinary whiskey bottles, it could be used for a whiskey bottle. I know the difference between bottles that are ordinarily used for wine and those ordinarily used for [335] whiskey. I really could not say if it was a bottle that was ordinarily used for wine or a bottle that was ordinarily used for whiskey. It could be used for whiskey. I cannot say that it was a wine bottle or a whiskey bottle. I would not be sure whether I saw any gin bottles there. I believe I did go out there at one time to see them all. I don't think on my last visit in September I went out there to examine them. There were not very many out there. There might be a half dozen; not more than a half dozen; that is about all I saw on that occasion. I had that place under suspicion

(Testimony of Patrick Kissane.)

longer than a year. I would not say that in September, when I went on the back porch and looked at the bottles whether or not I examined them, but I did go out there at times before that. I would not say that I went out there in September; I would not be sure about that.

Mr. TAAFFE.—I think that question has been asked and answered half a dozen times.

The COURT.—Let him answer again. Objection overruled.

Mr. GILLIS—It has never been asked yet.

Mr. TAAFFE.—Exception.

The WITNESS.—(Continuing.) I don't remember that in September I called Mahoney's attention to the bottles on the back porch that could be used for whiskey bottles. Mahoney was around there when I went through the premises. I think he was in the kitchen with me, when I walked in the kitchen and looked out on the porch. I really don't know if he went through the different rooms with me; I don't remember if he did. I didn't see a slot machine in the kitchen; I didn't see a slot machine in the whole place.

Q. Did you draw any conclusion, or had you drawn any conclusion at that time, as to what kind of a business was being conducted there? [336]

Mr. SMITH.—That is objected to on the very ground indicated by the question itself.

The COURT.—Overruled.

Mr. SMITH.—Exception.

(Testimony of Patrick Kissane.)

A. Of course, it was a suspected place of bootlegging, and that is the reason I was visiting it.

Mr. GILLIS.—Q. Suspected of bootlegging, but did you draw any conclusions as to what kind of business they were conducting there, if any?

Mr. SMITH.—The same objection.

The WITNESS.—(Continuing.) I thought they were bootlegging; that was all there was to it. I told Mahoney in September I thought they were bootlegging, but I told him a whole lot of times during the year, and every time that I talked to him he told me, "You go and see the boss." I probably did tell him in September that I thought he was bootlegging there. I didn't ask him if he was doing anything else or conducting any other kind of business there safe bootlegging. I didn't ask him to show me around; he didn't live there; he never lived there. He told me he was a bartender there. I didn't see any evidence of any business being conducted there. It was pretty hard for a man in uniform to get any evidence on a place like that, I went through all the rooms, but I had to climb a long flight of stairs, and wait outside the door until he felt like letting me in, admitted me, and I had to go up a long flight of stairs. I stood in the vestibule, there is a little vestibule there at the front door. It is just one step from the sidewalk. I stood there and pushed the button and went in. After I got there I didn't see any evidence of any kind of business being conducted there at all. If I got any evidence I

(Testimony of Patrick Kissane.)

would make an arrest. I didn't see any evidence of a soft drink place being conducted [337] there, or a barber-shop, or anything else. I would not say that I asked Mahoney in September what kind of a business he was running there. After being there all year, I would not say what I said to him. I don't really know what I did say to him, or if he said anything to *be* or not; probably he went about his business; I don't know. On the occasion of my visits there I didn't see any person, individually, in that place, except Marron, Birdsall, Mahoney and Brand. I saw strangers in there besides those three, once in a great while. Most of the time there was not anybody there when I visited the place, but I have gone up there several times when there was one man, two men at the most. I never counted the times that I saw strangers in that place during the year 1924. I could not figure exactly how many were up there in the year; I could not say. I would say that I saw strangers in there other than Marron, Birdsall and Mahoney more than five times; I would say probably 20 times. I don't think I ever saw more than two people in there at once. The first time I saw strangers in there other than these three men might be a little over a year ago, the last part of 1923, say, October or November or December. The first strangers, if I remember right, I saw in there, I kind of think they were right in the room, right in front of the landing at the head of the stairs. The door was open. The

(Testimony of Patrick Kissane.)

doors were always open when I went there. I would not say that the doors were shut at any time I was there. I believe I went in there these two men were that I first saw. They were sitting down as though they were talking to Mahoney. I think Mahoney let me in. I don't know whether Mahoney went back in the room before I got to the head of the stairs; he may have. After I got up to the head of the stairs he was not five feet away from me; the room is right off the head of the stairs. I don't think he was sitting [338] down. I think he was standing up. I would not be sure, but I think I asked him who the two men were, and he said friends of his. He saw me coming up the stairs. Then he went in where these two men were, and I followed up the stairs, and went in there where he was with these two men. I spoke to him and asked him who these people were. He said they were friends of his. They were just talking; they were smoking, I think, if I remember right. There was nothing on the table, no evidence of any kind of drink on the table. There was nothing to eat on the table. I would not say that there were ashtrays on the table; there might be. That is all the conversation I had. I looked around and went out. I think Mahoney went back to the men. Then I went out. I really cannot tell when the next occasion was that I saw anyone in there; it might be a month or an hour after, that I happened to go in at the time that somebody happened to be in

(Testimony of Patrick Kissane.)

there. They were not at the head of the stairs to receive me. They might be in the front room; they might be in the other room in the back; I would not say about that. I remember an occasion when I can place where the men were that I saw in there. There were some in the front room. I went in there at times when they were in the front room. I never saw any more than two men in the front room. Mr. Mahoney did not always let me in. Mr. Birdsall used to be there once in a great while. I went in there when these people were in the front room. They were sitting down in the front room talking to one another. I didn't see anything on the table, no evidence of anything to drink on the table. I don't think there was anything to eat on the table. I don't think that I ever went in there when there was one man in the front room and one man in another room. When these men were in the front room Mr. Birdsall or Mahoney let me in. Sometimes they would go around the different rooms with [339] me, and sometimes they would go back and talk to their friends. As a rule they would be around. As a rule they would walk around the rooms with me. When I went on my inspection of the flat at 1249 Polk Street, as a rule Marron or Birdsall or Mahoney walked around with me. They were present there all the time. I would not say that every time I went there and went through the rooms that some of these individuals were with me, but pretty near all the time. I was

(Testimony of Patrick Kissane.)

always in sight in these rooms. You cannot lose sight of each other unless you go into the kitchen and you are away from these rooms. I never went in the kitchen when they were not with me. They were down there pretty near all the time. They were probably not there every time in 1924; there were probably four or five times, to the best of my recollection, that they were not with me when I went down to the kitchen; maybe more and maybe not that much; probably five times. There was wicker furniture in this place. I could not tell you how many rooms were fitted out with wicker furniture. I cannot recall, but I am sure there was one room anyway. I would not be sure about that. It is so long ago, I forget; I can't tell; I could not tell you if these rooms had cuspidors in them. I could not tell you if there were cuspidors in at least three of them; it is quite awhile ago. I can't remember back that far now. I have been going over this entire situation in my mind since last October. I have thought back over what I did in that place and what I saw in that place, but about the spittoons, I didn't keep those in my memory. That is something I didn't give much attention to. I can't recall the first time that I saw that the stove had been removed from the kitchen. I can't tell you approximately. It would make an impression on my mind; I kind of think it must have been removed somewhere around July or August, 1924; I would not be sure about that. I didn't talk to Sergeant [340]

(Testimony of Patrick Kissane.)

Gorham about this place at any time prior to October 2. I never did. He never was in that place with me. I don't think that I ever talked to him about it. Captain Casey received my written reports. I don't know how many reports I gave to him; probably two or three, as near as I could judge. It was not customary to make reports to Captain Casey if I didn't discover anything, only when he calls for it. I never discovered anything so I didn't make any reports to him.

Q. Now, when you went in there and saw Birdsall in there for the first time, you knew that Birdsall had been a bartender, did you not?

Mr. SMITH.—Just a second; we will object to that on the ground it is immaterial, irrelevant and incompetent, and there is nothing in this record to show that Mr. Birdsall was a bartender, and not involved in the issues, whether he was a bartender or not; and I ask that the question be stricken from the record.

The COURT.—The motion is denied and overruled.

Mr. SMITH.—Note an exception.

A. Yes, I did.

Mr. GILLIS.—Q. You knew that was his principal business, didn't you?

A. Yes, and had been for a great many years.

Mr. SMITH.—I will object to that on the ground that it is immaterial, irrelevant and incompetent, and has no bearing upon the issues of this case what he had been doing for a number of

(Testimony of Patrick Kissane.)

years; we are only concerned with what happened from May, 1923, the period covered by this indictment.

Mr. GILLIS.—I am only asking if he had that knowledge of this man at that time.

The COURT.—Overruled.

Mr. SMITH.—Exception.

A. Yes. [341]

Mr. GILLIS.—Q. And that was one of the things that led you to suspect the place as a bootlegging place when you saw him in there, was it not?

Mr. SMITH.—Same objection.

The COURT.—The same ruling.

Mr. SMITH.—Note an exception.

A. Well, I suspected it as a bootlegging place before ever Birdsall came there.

The WITNESS.—(Continuing.) That rather convinced me it was a bootlegging place. When I was in the place, going around these rooms, if they were not following me, I didn't look into the cupboards or anything like that. They were closets, not cupboards. The closets were locked. I didn't look in the cupboard in the kitchen. I didn't open the cupboard at all in the kitchen. They were around there, close by. They never stopped me from doing anything that I wanted to do, but I tried the closet, there was one in the hall, and some in the rooms, and I found them locked all the time. They didn't object to me trying the door, but it was locked. I said to them, "It is locked. What have you got inside there?" "Well," they said, "hands

(Testimony of Patrick Kissane.)

off, you have not got a warrant," or some such remark. I don't think they told me that every time I went in and tried the door. Every time I went in there I found the door locked; I found them locked every time I tried them. I think I tried them every time I went in. They always said to me, "Hands off, you haven't got a warrant." When I tried the door they would make a remark of that kind. I don't really know what answer I made. I really don't know what—"It is locked" or something like that, that I made a remark about it had been locked. I don't think I ever did look into the cupboard of the kitchen. I saw glasses on the drain-board in the sink, but they were washed, on a shelf right [342] along there by the cash register. I don't know that I asked him what he was using these whiskey glasses for. I may have asked him what he was using the highball glasses for. I really could not recall it. I believe I might have asked him something about the wine bottles and those other bottles on the porch that I said might be used for whiskey. He made some kind of a laughing remark, I believe once, when I asked him about, "What about these bottles?" and he said he didn't know. I did go out to the bottles and I picked up a bottle at one time, and I turned it over and it was empty. I don't think I picked up the bottle on the back porch. It looked as if it was there for a long time. I believe I picked up bottles on the back porch. Probably I did pick up one or two and turn them over, but they were empty. I

(Testimony of Patrick Kissane.)

really could not tell you if there were labels on them. If I did I could not recall it now. I may have looked to see what label was on. I was there for the purpose of determining whether or not this was a bootlegging joint. That was the object in going there, and my only object. I knew Birdsall had been a bartender before. I believed it was a bootlegging joint. The bottles on the back porch looked to me like they were there for a long time. They were kind of worn out. That is quite a while ago that happened, so I really cannot recall whether I went out on the back porch and picked up the bottles to see what labels were on them, or examined each one of them. There was more than one occasion I saw the bottles there on the back porch. There were different bottles on those occasions. I did look to see what labels were on the bottles. I think one was a gin bottle, if I am not mistaken. I believe it had the label of Gordon Gin on it. There was never more than one gin bottle there. The gin bottle was empty, and I threw it down. I just left it there. I didn't report that back to Captain Casey, nor to any of my superior officers. I didn't consider that that was any evidence, because [343] the bottle was empty. It was laying out there for a long time. I didn't think the fact that it had "gin" written on it and was a gin bottle was of sufficient importance to take it to my superior officers. I didn't make any report of it. The gin bottles, the wine bottles, and these bottles that I said could be used for whiskey were the only bottles I

(Testimony of Patrick Kissane.)

saw there. That was all. I don't think I saw any beer bottles there. I don't think I saw one. I didn't see any ginger-ale bottles there. I don't think I saw any Shasta water bottles there. There was an ice-chest in the kitchen. I would not be sure whether there was an ice-chest there or not; I don't remember whether there was an ice-chest there or not; I am not sure. I can't remember whether there was an ice-chest there or not. I think I did see ginger-ale bottles there,—I mean Shasta bottles, those big bottles. They were in the kitchen, probably three or four. I think they were full, some of them. When Mahoney told me on one occasion that he was a bartender, and I would have to see the proprietor, I knew who he meant by "the proprietor." He meant Birdsall. I understood him to mean Birdsall. That was the only conversation I had with him. When he said he was a bartender, that aroused suspicions and interest in my mind as to what he was a bartender of. I knew there was bootlegging carried on there, we suspected it, but we could not get the evidence. I think I asked him what he was a bartender of. He told me to go to the boss, or some remark like that. The boss was not around. I didn't go to him at any other time. I saw Birdsall there after that. I believe I told Birdsall that Mahoney said he was a bartender, and I wanted to know what he was a bartender of. Birdsall didn't say anything to this. I don't think he did. When I first met Marron I asked him what he was doing, if he wasn't bootlegging there, and he

(Testimony of Patrick Kissane.)

denied it. I asked him if he [344] was living there, and he said Birdsall was there at that time. Neither Mahoney, nor Birdsall, nor Marron ever offered me drink at that place, in any shape or form. They didn't want to give me a drink of ginger-ale. They never paid me a cent for looking after the place, not a penny. No one connected with this 1249 Polk Street ever gave me a cent. They never offered me a drink. I never saw any drinks served in there. Outside of the full Shasta water bottles, I never saw any other bottles with any liquid that could be served as a refreshment. The other bottles were empty. The Shasta water bottles were full. I never saw anything there that was fixed for people to eat in that place. I probably rang three or two bells to get into the place. I had no certain bell to ring. I just went up and pushed the button.

Redirect Examination.

(By Mr. TAAFFE.)

The lower floor is a restaurant. The ceiling is pretty high. I really could not tell you how high. I really don't know how many steps from the vestibule where you ring the bell up to the top of the stairs, but it is pretty high. It is as high as the ceiling of this courtroom. The steps went directly up, and then you turned when you got to the top. On each occasion that I entered the premises it was necessary first to attract the attention of someone on the inside and ring a bell. My visits were about the same time each day that I went in there. I

(Testimony of Patrick Kissane.)

would go in at the same time every day. I visited the place at different times. I had no set time to go in. I went there for the express purpose of getting evidence to make an arrest, if such evidence could be found, and I didn't at any time ever find any such evidence.

(R. Tr. Vol. 6, pp. 329–374, inc.) [345]

TESTIMONY OF JOSEPH GORHAM, FOR THE DEFENDANTS.

JOSEPH GORHAM, a witness called for the defendants, and sworn, testified as follows:

Direct Examination.

(By Mr. KELLY.)

My name is Joseph Gorham. I am a Sergeant of Police of the San Francisco Police Department. I have been Sergeant of Police of the San Francisco Police Department for about four or five years, I am not sure. I was a member of the Police Department before I acquired the rank of sergeant for 20 years last April I was appointed originally. I was first assigned to the Park Police Station. I don't know how long I remained there—between the Park and O'Farrell Stations, which are part of the same district, I put in ten years. After that I went to the Southern Station. I was sent to the Southern Station. I was there until about November, 1916. From the Southern Station in 1916 I went to the Bureau of Permits and Registration, Hall of Justice. I remained there five years.

(Testimony of Joseph Gorham.)

Chief O'Brien, who was at that time Chief Clerk, was the head of the Bureau of Permits and Registrations in the Hall of Justice at that time. Chief O'Brien's rank at that time was Chief Clerk to Chief White. Lieutenant Casey had charge of that particular place. Chief O'Brien was the man in the clerical force in charge of the Bureau of Permits and Licenses in the Hall of Justice and was at that time Sergeant and Lieutenant. Captain Casey is now Captain of Police District No. 5, being the Bush Street Police Station. I remained in the Bureau of Licenses and Permits for a period of about five years. From there I went to the Southern Station. I remained at the Southern Station until last March, from November, 1921, to March, 1924. In March, 1924, I went from the Southern [346] Station to the Bush Street Station. I was assigned to the Bush Street Station on March 7, 1924. I reported to Captain Casey at that station. I have been attached to that station ever since the 7th of March, 1924. I reside at 1132 Masonic Avenue, San Francisco, with my mother and brother. My father is dead. I live with my mother and brother at that place. I have lived there for four years this month. My attention was first drawn to the premises at 1249 Polk Street on the 27th day of March, of last year. There was a complaint from the Chief's office that bootlegging was carried on there. That complaint was dated the 26th of March. It was given to me on the 27th for investigation. I went out on the 29th of March with Officer William Maguire, about

(Testimony of Joseph Gorham.)

eight o'clock at night. I went out to this place, 1249 Polk Street, at eight o'clock on the night of March 29th, in the presence of Mr. William Maguire, and I met George Birdsall at the head of the stairs, and from the way he greeted me, he apparently knew I was on that detail. I stated my business up there. I told him we had a report that there was bootlegging in the place, and I came up for the purpose of searching his place, and he wanted to know if I had a search-warrant, and I told him I had not, and he refused to give me permission to search the place. I got into the place by ringing the door-bell downstairs. There is a flight of stairs from the door to the landing. The door is set in about three feet from the sidewalk. It is up on a step, and this flight of stairs is probably three feet inside of the door. On that occasion I got into the premises as far as the head of the stairs, or the hallway at the head of the stairs. Birdsall had no hat on and he was in his shirt-sleeves. I told him we had a report —he greeted me when we came up, and said, "I see you are on the detail over here," and I said, "Yes, we have got a report you are bootlegging [347] up here, and we want to search your place." He wanted to know if I had a warrant, and I told him I had not, and he said without a warrant I could not search. That was on the 29th of March. On the 27th Maguire was off, and I was off on the 28th and on the 27th I sent a young man named Ward, who was on the detail with me at times up there, for the purpose of seeing if he could make a buy of any

(Testimony of Joseph Gorham.)

liquor there, and he was unsuccessful. I took up with William Golden, who was the Chief Bond and Warrant Clerk of the City and County of San Francisco, the question of my visits to Birdsall's place, and his refusal to allow me to search it. I stated exactly what the situation was there, and told him I wanted to get a warrant to search the place, and he refused the warrant, because I could not testify to a sale of liquor up there, and I could not get anyone else that would testify to a sale. This man William Ward, whom I sent there, is a man who was referred to as the special detail. The other man of the detail is Maguire. I was the ranking officer, the only noncommissioned officer in the bunch. James M. Mann is a Patrol Sergeant in the Bush Street Station. Sergeant Goodman H. Lance is a patrol sergeant in the Bush Street Station. Sergeant James J. Farrell is a patrol sergeant in the Bush Street Station. Police Officer Robert E. Garrick is a police patrolman like Kissane. James A. Foohig is likewise a patrolman. The difference between a special detail police sergeant of the Bush Street District and the patrol sergeant is that the patrol sergeant is assigned to a certain section, he just keeps the patrolmen in that section under his direct supervision; he visits them at irregular times during the watch, checks up on them, to see they are patrolling their beat, if they are on a particular detail to see whether or not they are attending to that detail; if a complaint comes in about something on a beat that is referred to a patrolman, it is up to him

(Testimony of Joseph Gorham.)

to see that the patrolman is taking the proper action on it. [348] I was not a sergeant of police, assigned to the special detail, called upon to patrol any particular beat. My duties were the same as the sergeant of the platoon. In detail my duty as a special detail sergeant differed from those of a patrol sergeant in this: That a patrol sergeant is in uniform; I do not wear a uniform on that detail. I was in court practically every morning. I would report to the station about ten o'clock on my way down to the police court. After finishing up my business in court, I would always have to meet the captain at two o'clock in the afternoon for the purpose of discussing complaints received, the arrests made on the preceding day, disposition of cases in court, different matters he might want to see me about, and all complaints from the Chief's office, and other complaints that would come within the scope of the special detail were turned over to me for investigation. These complaints comprised bootlegging, prostitution, gambling and narcotics. We got a great many of them. In addition to the ones I got from the Chief's office, there were letters written in, anonymous letters, that came in more or less every day, and telephone messages about conditions at different places, and we likewise had all losses and stolen property, and petty larceny, of course, to investigate. Neither Mr. Maguire nor Mr. Ward, who were associated with me on this special detail, were obliged to wear a uniform. The duty cast upon me as a sergeant in charge of the police detail,

(Testimony of Joseph Gorham.)

and the members of it, Mr. Ward and Mr. Maguire, caused me to rove practically all over the district, investigating matters. It took us away from the district on the night of March 29th, at eight o'clock, when I went up to 1249 Polk Street with Mr. Maguire. We were not at the premises two minutes. Birdsall refused to allow us to search the premises, basing his refusal upon the ground that I had no search-warrant. From [349] where I met Birdsall at the head of the stairs, I could see, he has a great big hallway, there are six rooms there, and all the rooms open into this one hallway, a sort of oblong hallway, and at that time, or another occasion up there, I could see where one of the rooms was furnished up apparently as a living-room. There was a part of a Chesterfield suite in there. The visit I made with Officer Maguire on the 29th of March, 1924, was the first time I was ever in the premises. After visiting these premises I made a report to Captain Casey of what happened there. Before making that report I went to see Mr. Golden of the Bond and Warrant Clerk's office, of the District Attorney of this city and county, for the purpose of securing a warrant to search the premises. That warrant was denied me by Mr. Golden on the statement that I had no evidence upon which to issue it. The next time I went there, there was a burglary committed over there some time during the month of May, and there were two fellows arrested in the commission of the burglary; Birdsall refused to swear to a complaint against either of them.

(Testimony of Joseph Gorham.)

Captain Casey told me to go over to see Birdsall and urge him or persuade him, or in some manner get him to go down and swear to the complaint, and the case was continued. I went over again—he then had one of the arresting officers swear to the complaint and subpoena Birdsall as a witness in the case. I never heard of George Hawkins in my life until this case. I know the defendant Marron. The first time I came in contact with defendant Marron was when I was in the Bureau of Permits. He was interested in the dance hall, at the Moose Hall, a permit granted under the Board of Police Commissioners, and he came down there in reference to that on at least one occasion, possibly more. The next time I met him was in August, 1923, I think it was August 15th, that a posse accompanied by Lieutenant Healey, [350] arrested Eddie Marron, a man named Hobson, a man named Murphy, and two Italian fishermen; I can't remember their names. It was over on the China Basin, up near Pier 54. At that time we seized a fishing boat, three automobiles, and approximately 150 cases of liquor, some in cases, some in sacks; we arrested and we charged Marron and the first ones I have named, Hobson and Murphy, with criminal conspiracy. Marron had a pistol on him at the time, and we put in a special charge on him of violating the Assembly Bill covering that act; and later on we arrested these two fishermen and charged them with conspiracy, and also transportation and possession of liquor. We booked the fishing boat and three auto-

(Testimony of Joseph Gorham.)

mobiles in addition to these other things as evidence. I never saw Marron in No. 1249 Polk Street. I was in 1249 Polk Street with Captain Casey on the date of October 7, 1924. I saw him on that date. That is the only time I ever saw him in that place. The circumstances of my meeting him at that time and place were that Captain Casey told me that he was going to get a statement from Marron, Birdsall and Mahoney in connection with the arrest that had been made there four or five days previous, and likewise in connection with the statement or report there in regard to money being paid out to police officers, etc. I went up there and got a statement from Marron at that time. Marron denied that he ever paid any money to police officers. Birdsall was not there at the time. Mahoney was there. Mahoney did not participate in the conversation. He would not make any statement, or he did not take any part in it. I met Marron on the outside on that occasion. I would not be sure as to Mahoney. Mahoney may have been in the place when we went in. This conversation occurred in one of the rooms in 1249 Polk Street. It was the front room, and I think it is the farthest room, nearest to Sutter Street —that would be on the [351] southerly end of the building. We were up there I should say 10 or 15 minutes. I was not present at a subsequent interview between Captain Casey and Birdsall, held the same day at the Police Station. That was over at the Police Station. I was not there. I didn't either on or about the 31st day of March, 1924, or

(Testimony of Joseph Gorham.)

at any time, accept from any one of the defendants named in this proceeding, George Hawkins, Walter Brand, Joseph E. Marron, *alias* Eddie Marron, George Birdsall, *alias* George Howard, or Charles Mahoney, any money, great or small, for the purpose of protecting 1249 Polk Street, or any other place. I was never in the premises referred to throughout the evidence in this case as 2031 Steiner Street. I was never in the premises referred to throughout the evidence in this case as 3047 California Street. I was never in the premises referred to throughout the evidence in this case as 2922 Sacramento Street. Those places are outside of the district. Those three places are wholly outside of the Police District No. 5. (The attention of the witness was then directed to United States Exhibit 7.) This is a report written by me. It is the report of April 1, 1924, which I have referred to in my testimony. (The attention of the witness was then directed to another document, dated October 13, 1924.) This document is a report written by me concerning those same premises. I didn't read the report that has just been called to my attention; I just looked at the writing. That report was in response to an order signed by the Chief to Captain Casey with reference to a prior report made by me. (The attention of the witness was then directed to United States Exhibit 37.) This document is in my writing. These three reports are all reports made by me to Captain Casey in response to an investigation made by me concerning 1249 Polk Street. I never did have any

(Testimony of Joseph Gorham.)

conference or understanding of any kind with either George [352] Hawkins or Walter Brand or Joseph E. Marron, *alias* Eddie Marron, or George Birdsall, *alias* George Howard, or Charles Mahoney, either individually or jointly, in which I agreed with them, or any one of them, or conspired, or confederated with any one of them, or all of them, to allow the maintaining of a a nuisance at Polk Street, or Sacramento Street, or Steiner Street, or California Street, or for the illegal possession of liquor at any one of these premises, or for the sale of liquor at any one of those places, or to permit the transportation to or from any one of those places of liquor illegally, or otherwise, or at all, at any time. As a matter of fact, the only time I have ever talked to Mr. Marron are the times I have indicated here—the time that I arrested him and the time I was up there to get the statement. I don't know George Hawkins. I never saw Walter Brand until I met him out here in connection with this case, or Charles Mahoney, at any time. George Birdsall never at any time or any place paid me any money for any purpose. None of the defendants named in this indictment has ever paid and I have never received from any one of them any money directly or indirectly for the purpose of permitting violations of the law charged in this indictment against them, or any other violations of the law. I never conspired with my fellow police officer, Patrick Kissane, to allow any violation of the law at any of these places. I never remember speaking about this place at all to Kissane.

(Testimony of Joseph Gorham.)

Cross-examination.

(By Mr. GILLIS.)

I went there on March 29th about eight o'clock at night. Officer William Maguire was with me. I was in plain clothes. We had to ring the bell before we would be admitted. [353] George Birdsall opened the door. I could not see him, there was a turn in the stairs up at the head. He greeted me I think before I greeted him. He said, "Well, I see you are on the detail here," or something to that effect, showing that he knew I was on the detail. I had gone there in answer to a request from Chief O'Brien's office that the place be investigated. It was an order from the Chief's office. I had gone there for the purpose of investigating this place in compliance with that order. I have known Birdsall for over twenty years.

Q. When you saw him at the head of the stairs, you knew at that time that Birdsall had been a bartender for a great many years, did you not?

Mr. SMITH.—That is objected to on the ground it is immaterial, irrelevant and incompetent, and has no bearing on the issues in this case.

The COURT.—Overruled.

A. I have always known Birdsall, either as bartender or saloon man, except there was one time he worked for the gasoline station upon Divisadero Street.

The WITNESS.—(Continuing.) He worked there at the gasoline station for probably a couple of

(Testimony of Joseph Gorham.)

years. The last time I had seen Birdsall previous to that time I met him at 1249 Polk Street, was when I saw him at the gasoline station. I could not say how long prior that was to my visit to 1249 Polk Street; probably a couple of years. I was friendly with him. I was never unfriendly with him. He spoke to me, I think, before I spoke to him. He said he knew I was on that special detail. I told him yes, that I was, we had come up there to investigate his place, an alleged bootlegging place. He said he lived there. He said that was his residence. He would not indicate at all whether he was doing any business there or not. I told him about the [354] substance of the complaint. I told him I wanted to search the place, and he asked me if I had a warrant, and I told him I had none. I was already in the place but he would not permit me to go through the different rooms. There was one of the doors open in one of the rooms, and I think that was the room that we were in when I was with Captain Casey, when we interrogated Mahoney and Marron. I was very sure that that was the door that was open. To the best of my recollection, it was open when I went up there. I didn't go inside. That is my best recollection, there was furniture of a regular davenport set, there was a davenport, or lounge, whatever you call it, a part of that suite, and one of these easy chairs; I would not say as to whether or not there was a table. I did not go directly to the room; that room was perhaps ten

(Testimony of Joseph Gorham.)

or fifteen feet from where I was standing. It was not directly in front of me, like the head of the stairs would be here, I would be standing here, and the entrance to that room would be over about where this chair is, on the opposite side of the table from you. It would be easily 15 feet from you. I believe Birdsall is married. I didn't see anybody else there. I don't know his wife. I didn't talk with Birdsall as to what he had been doing the past few years. I didn't ask him how he happened to come to live there. I never had numerous reports that he was bootlegging there. That was the only report I ever had of it. I didn't tell him I had numerous reports that he was bootlegging there. I told him I had this particular complaint. He said he lived there, and he was in his shirt-sleeves, and would not let me go any further. I didn't know at that time that Officer Kissane had gone in there twice a week for over a year. The place was specially assigned to me with others to investigate. After I could not gain admission, after March 29th, I had Officer Ward make [355] probably half a dozen visits to the place. There was nothing I could do. He knew me. I might as well go up there in uniform as I did. I did do something further. I made application for a search-warrant to search the place. That was the one I testified to. I had Officer Ward go up there on probably half a dozen occasions. I didn't do anything else besides go into the Bond and Warrant Clerk's office. I just di-

(Testimony of Joseph Gorham.)

rected the man that was working under me what to do. That was Ward. Outside of the directions I gave him, I did do something else. I saw he went up there and carried out my instructions. I was across the street. He was with me every time I sent him up there; I was on the corner, across the street. Outside of the time I sent him up there, I did nothing. There was nothing else I could do after that at that place. I didn't fall down on it after my report of April 1st that I would give that complaint continued attention. I did not. I always kept sight of the fact that it was a bootlegging place, and any time there would be an opportunity to make an arrest there I would go up there and make it. I had no opportunities. I had to wait there until there would be liquor purchased. There was no opportunity available to me. I did try to make an opportunity other than sending Ward up there. Any time I passed the place, for instance, if there was any liquor being brought into the place I would have taken action on it. I passed the place sometimes every day, sometimes more than that, at different times of the day. I didn't stand outside that place to see how many people went in. I have nobody to station to see how many people went in and out. I am not making details. I did not station anybody outside of the place to see whether there was liquor taken into that place. I never went down to the Clerk of the District Court here to ascertain whether any complaints or informations had ever

(Testimony of Joseph Gorham.)

[356] been filed against this particular place. I made no investigation of the records of this court. There was never any record in the Police Court with reference to that place, to my knowledge. I never made any investigation at that particular place as to whether there was or not. I didn't know the place was raided on May 15th. I didn't know that George Birdsall was arrested at that time. The first time I found that out was when I was in court the other day. The place is a little over half a block from the Bush Street station. I did give the place continued attention from that time on. I kept it under observation any time I was in the neighborhood; that was all I could do. I didn't go there in May to investigate a burglary charge. I went there for the purpose of having them swear to a complaint for a burglary that had been committed there. The burglary was committed and the arrest made on the night watch. I didn't go there to investigate the burglary. I went there for the purpose of having them swear to a complaint against the burglars. I saw George Birdsall there. I met him about the same as I had the first time, up at the head of the stairs. I told him that there was a burglary committed there, that Captain Casey instructed me to come over and have him come down and swear to a complaint against these men. He said he knew the men and did not want to do it. I didn't ask him anything about the burglary. I knew the men were already arrested. There was

(Testimony of Joseph Gorham.)

nothing to investigate in connection with the matter. I didn't ask him to look at the place where the men came in. I didn't ask him to take a look at the place where the burglary had happened. He didn't invite me in. The doors were closed on that occasion; all of them. I don't recall what the burglary was. It was something like $200 or #200, if I remember correctly. I could not say if there was liquor involved in it. I don't think so. I don't know. [357] (The attention of the witness was then directed to a report dated October 13th: "In compliance with the order of October 12, you had visited these premises about two months ago to see George Birdsall in connection with a burglary committed there. On each of these visits I was received by George Birdsall at the head of the stairs in the hallway, the doors of all the rooms were kept shut, and I could see no slot machines in the premises, nor could I observe whether or not there were any people in the place.") I don't think that report is a mistake. The report is absolutely correct. On one occasion there was one of the doors open. I went there twice on that burglary up there. The first time he refused to go down, and then I went over on another day, the following day, to further urge him to go down; and when I told the Captain he would not go, that is when he had a subpoena issued. I went there twice on the burglary charge. The following day I believe I went there after the first time I was there. I don't recall what date

(Testimony of Joseph Gorham.)

the burglary was committed, but the first day when the case was called in the police court, Birdsall did not show up to swear to the complaint—I don't recall the date. It was in the month of May. I don't recall what time in the month of May. I would not say whether it was early, or middle, or latter part of May, I could not say. I never looked up the date of it. I don't know the date. I think it was the following day after the first visit I went there on the second visit with reference to the burglary. I saw Birdsall again. Birdsall said the same thing, that he did not want to prosecute these men. I met him the same place, at the head of the stairs. The doors were closed. That was the extent of our conversation. (The attention of the witness was then directed to the report of October 13: "October 13. To Captain John J. Casey. Subject: Conditions observed at No. 1249 Polk Street. [358] In compliance with your order of October 12, 1924, relative to conditions observed by me and visits made to 1249 Polk Street, I will state that about the latter part of March of this year, I visited this place to secure evidence of alleged bootlegging there, and was refused admission to any of the rooms unless I had a warrant. I again visited there several times about two months ago to see George Birdsall, in connection with a burglary committed there. On each of these visits I was received by George Birdsall at the head of the stairs in the hallway, the doors of all the rooms were kept shut, and I could

(Testimony of Joseph Gorham.)

see no slot machines on the premises, nor could I observe whether or not there were any people in the place.") I might have been mistaken when I made that report to the effect that all of the doors were shut on each of my visits there. I know the first time I went there I did see the door open. I didn't check up to see what time that burglary was committed. It appeared to me it was about two months, perhaps, and the time I made wrong. It is absolutely wrong, as far as the burglary is concerned, yes. I did not see anyone else besides Birdsall there. I never saw Mahoney in the place. I never saw him going in or out. I never did cease giving 1249 Polk Street my attention. I never ceased to walk up and down past the place. I was past there very often. These are the only occasions that I was ever in that place, as far as I can recall. I was in plain clothes all the time I was detailed there. I can't recall any other times than the occasions I have testified to that I was in that place. I may have been there once or twice; I can't remember. I don't think I could recall that I had been there other times than the occasions that I have testified to. I was specially detailed to investigate that place. I knew Birdsall was a bartender and suspected of bootlegging. I don't recall whether or not I had been there at other times. I had one hundred other places of the same character to investigate. I could not tell you where I had been, as to any particular place, on any certain day. I can't recall that I

(Testimony of Joseph Gorham.)

had [359] been in there at other times; I might have been, but I can't recall. I never saw anybody else in the place besides Birdsall. I never had a drink in that place in my life. I never took any money out of that place. The first time I was there I was there only about two minutes, and the other times that I was there was about the same length of time, about two minutes.

(R. Tr. Vol. 6, pp. 374–396, inc.)

TESTIMONY OF WILLIAM MAGUIRE, FOR THE DEFENDANT JOSEPH GORHAM.

WILLIAM MAGUIRE, a witness called for the defendant Gorham, and sworn, testified as follows:

Direct Examination.

(By Mr. KELLY.)

My name is William Maguire. I reside at 609 22d Avenue. I am a police officer attached to Company E, Bush Street Station, and have been so attached for 15 years. I know Sergeant Gorham. I was associated with Sergeant Gorham in the performance of police duties in the Bush Street Station, since around March 8, 1924, until about October 11, 1924. Prior to and on or about March 8, 1924, I was on what they call the special detail of that district, and I continued on it after the arrival of Sergeant Gorham. I was under him. The other member of that special detail was one William Ward. I was on that special detail before Sergeant Gorham took command for

(Testimony of William Maguire.)

about 11 years. I accompanied Sergeant Gorham to the premises at 1249 Polk Street on Saturday, March 29th, about eight P. M. We reported in for duty at the Bush Street Station at 7:30, which was our regular hour; so after looking over our orders, Sergeant Gorham instructed me to accompany him to this place, 1249 Polk Street. We entered. Sergeant Gorham [360] rang the bell. We were admitted by one George Birdsall, who was standing at the head of the stairs. He had his coat off, and also his hat, and his sleeves were rolled up. So Gorham did the talking and explained to him that there was information from the office of the Chief of Police with reference to bootlegging there, which he denied, and he refused any further admittance to the premises, stating that he was standing on his constitutional rights, and we could not enter without a search-warrant, that that was his home. We immediately left after questioning him. I met Birdsall five or six years ago in Chinatown. He was a guard when I was in the squad. He knew I was a police officer when I was present with Gorham that night.

Cross-examination.

(By Mr. GILLIS.)

In my duties with reference to 1249 Polk Street, when I went there, I was under the orders of the Captain of the district. I was assigned to Sergeant Gorham for special duty, as his associate. In the morning we reported to the captain at ten o'clock every day; we were in court, and came

(Testimony of William Maguire.)

back at two, and reported direct to the captain, and in the evening Gorham got all his orders, and he assigned Ward and I to do special work. If we did anything with reference to that place we didn't do it under Sergeant Gorham's orders, directly under the captain, but Gorham being the sergeant of the detail, he gave the directions after he got them from the captain.

(R. Tr. Vol. 6, pp. 396–398, inc.)

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TESTIMONY OF DANIEL J. O'BRIEN, FOR THE DEFENDANT JOSEPH GORHAM.

DANIEL J. O'BRIEN, a witness called for the defendant Gorham, and sworn, testified as follows:

Direct Examination.

(By Mr. KELLY.)

My name is Daniel J. O'Brien. I am Chief of Police of the city and county of San Francisco, and have been so a little over four years. I reside at 150 Corona. I am acquainted with Sergeant Joseph Gorham. I have been intimately acquainted with him since about 1916. I was at one time Chief Clerk to the late Chief White. Sergeant Gorham worked under me during the time I was Chief Clerk to the late Chief White, in the capacity of clerk in the Bureau of Permits and Registration. He was assigned to that duty in 1916, and was there when I was appointed Chief of Police, and remained, I would say, for at least a year

(Testimony of Daniel J. O'Brien.)

afterwards. I have never discussed his general reputation in the community in which he lives for truth, honesty and integrity with anyone. I know his general reputation in so far as police officers are concerned. I know him as a police officer. His reputation is good. I know defendant Patrick Kissane as a police officer. He was never under my direct supervision. About 1910 I think, maybe the latter part of 1909, about 1909 or 1910, I was assigned as a patrolman to the Bush Street District, and was on one watch; he was on another watch; I did not come in contact with him. Other than being a police officer and member of the San Francisco Police Force I have had no contact with him and do not know anything with reference to him. I have not discussed his general reputation in the community in which he does police duty as a police officer. The reason I could testify [362] in Sergeant Gorham's case is that Sergeant Gorham worked directly under me. I have never worked in the same watch with Officer Kissane, and had no discussion with reference to his police work with anybody in the district. Since I have been Chief of Police, if there were complaints made with reference to the efficiency of Officer Kissane as a police officer, they would come direct to me, under my supervision, as Chief of Police. There have been no such complaints made in the four years that I have been Chief, except in this particular case. Prior to this case there were none.

(R. Tr. Vol. 6, pp. 398–401, inc.)

TESTIMONY OF TERESA MEIKLE, FOR THE DEFENDANT JOSEPH GORHAM.

TERESA MEIKLE, a witness called for the defendant Gorham, and sworn, testified as follows:

Direct Examination.

(By Mr. KELLY.)

My name is Teresa Meikle. I reside at 121 23d Avenue, San Francisco. I am Assistant District Attorney assigned to prosecuting all cases in the Women's Court. I am under District Attorney Matthew Brady. I have been Assistant District Attorney under District Attorney Brady for the past two years. I know Sergeant Joseph Gorham. I have known him for the past seven months, since he has been assigned to the special detail in the night life cases. I know his general reputation in the community in which he lives for truth, honesty and integrity. His reputation is good. [363]

Cross-examination.

(By Mr. GILLIS.)

I don't come in contact with Sergeant Gorham only in my official capacity, in that I talk to these girls that are arrested afterwards and speak to them, and for that reason I would really know the way they were treated by Officer Gorham. It is through my official capacity. That is the only way.

(R. Tr. Vol. 6, pp. 401–402, inc.)

TESTIMONY OF JOSEPH S. LEWIS, FOR THE DEFENDANT JOSEPH GORHAM.

JOSEPH S. LEWIS, a witness called for the defendant Gorham, and sworn, testified as follows:

Direct Examination.

(By Mr. KELLY.)

My name is Joseph S. Lewis. I reside at 1860 Jackson Street, San Francisco. I am a wholesale jeweler, and have been such for the past eight years. My business is located at 133 Kearny Street. I know Sergeant Joseph Gorham, and have known him about 15 or 16 years. I know his general reputation in the community in which he lives for truth, honesty and integrity. His reputation is good.

(R. Tr. Vol. 6, pp. 402.)

TESTIMONY OF CHARLES W. GOODWIN, FOR THE DEFENDANT JOSEPH GORHAM.

CHARLES W. GOODWIN, a witness called for the defendant Gorham, and sworn, testified as follows:

Direct Examination.

(By Mr. KELLY.)

My name is Charles W. Goodwin. I reside at 506 [364] 5th Avenue. I am Vice-President and General Manager Marine Electric Company, located at Front and Howard Street. I know Sergeant Joseph Gorham. I have known him for

(Testimony of Michael J. Hanrahan.)

approximately 20 years. I know his general reputation in the community in which he lives for truth, honesty and integrity. His reputation is good.

(R. Tr. Vol. 6, pp. 402, 403, inc.)

TESTIMONY OF MICHAEL J. HANRAHAN, FOR THE DEFENDANT JOSEPH GORHAM.

Direct Examination.

(By Mr. KELLY.)

My name is Michael J. Hanrahan. I reside at 412 Ashbury Street, San Francisco, California. I am retired from business. Prior to my retirement I was engaged in the grocery business. I know Sergeant Gorham, and I have known him 16 or 17 years. I know his general reputation in the community in which he resides for truth, honesty and integrity. His reputation is good.

(R. Tr. Vol. 6, p. 403.)

TESTIMONY OF FRANK J. EGAN, FOR THE DEFENDANT JOSEPH GORHAM.

FRANK J. EGAN, a witness called for the defendant Gorham, and sworn, testified as follows:

Direct Examination.

(By Mr. KELLY.)

My name is Frank J. Egan. I reside at 1251 32d Avenue, San Francisco. I am Public Defender of the City and County of San Francisco. I have been such for three years last past. I know Sergeant

(Testimony of Frank J. Egan.)

Gorham. I have known him all my life, for 42 years. I know his general reputation in the [365] community in which he resides for truth, honesty and integrity. His reputation is good. As a Public Defender connected with the city government, in my capacity as an attorney, I came in contact with him. He is a very vigorous prosecutor. I will say that for him.

(R. Tr. Vol. 6, p. 404.)

TESTIMONY OF WILLIAM T. HEALY, FOR THE DEFENDANT JOSEPH GORHAM.

Direct Examination.

(By Mr. KELLY.)

My name is William T. Healy. I reside at 4125 Anza Street, San Francisco. I am Captain of Police, and have been such for one year. At the present time I am Commander of Richmond Police District. Prior to becoming Captain of Richmond Police District, I was a lieutenant attached to the Southern Station. Sergeant Gorham was down there at the time I was there. I have known Sergeant Gorham for 17 years. I know his general reputation in the community in which he resides for truth, honesty and integrity. His reputation is good.

(R. Tr. Vol. 6, pp. 404, 405 inc.)

TESTIMONY OF JOHN J. O'MARA, FOR THE DEFENDANT JOSEPH GORHAM.)

JOHN J. O'MARA, a witness called for the defendant Gorham, and sworn, testified as follows:

Direct Examination.

(By Mr. KELLY.)

My name is John J. O'Mara. I reside at 536 5th Avenue, San Francisco. I am Captain of Police, attached to the Park Station, and have been there for one year. I know Sergeant [366] Gorham. I have known him for 29 years. I knew him before he became a member of the police force. I have known him since he became a member of the police force. I know his general reputation in the community in which he resides for truth, honesty and integrity. His reputation is good.

(R. Tr. Vol. 6, p. 405.)

TESTIMONY OF JOHN J. CASEY, FOR THE DEFENDANT JOSEPH GORHAM.

JOHN J. CASEY, a witness called for the defendant Gorham, and sworn, testified as follows:

Direct Examination.

(By Mr. KELLY.)

My name is John J. Casey. I am a Captain of Police, commanding Bush Street District. I have known Sergeant Gorham for about 20 years. Prior to coming to the Bush Street Station he worked under me in the License Bureau for about five years.

(Testimony of John J. Casey.)

During that period I was the immediate head of the License Bureau. I know the general reputation of Sergeant Gorham in the community in which he resides for truth, honesty and integrity. His reputation is good. (To Mr. Taaffe.) I know Patrick Kissane, one of the defendants in this action. I have known him in the Police Department, and he has been under my direct command. I have known him for a considerable number of years. I know his general reputation in the community in which he resides for truth, honesty and integrity. His reputation is good.

(R. Tr. Vol. 6, pp. 406– 407, inc.) [367]

TESTIMONY OF HENRY R. PATTERSON, FOR THE DEFENDANT JOSEPH GORHAM.

HENRY R. PATTERSON, a witness called for the defendant Gorham, and sworn, testified as follows:

Direct Examination.

(By Mr. KELLY.)

My name is Henry R. Patterson. I reside at 2031 Hayes Street, San Francisco. I am manager of the Yosemite Taxicab Company, and have been such for two years. I know Sergeant Gorham. I have known him for 15 years. I know his general reputation in the community in which he resides for truth, honesty and integrity. His reputation is good.

R. Tr. Vol. 6, p. 407.)

TESTIMONY OF WILLIAM J. WARD, FOR THE DEFENDANT JOSEPH GORHAM.

WILLIAM J. WARD, a witness called for the defendant Gorham, and sworn, testified as follows:

Direct Examination.

(By Mr. KELLY.)

My name is William J. Ward. I reside at 75 Whitney Street, San Francisco. I am a police officer. I am attached to Company E, Bush Street Station, and have been so attached about nine or ten months. I was so attached in the months of March and April, 1924. I was in the premises 1249 Polk Street. I was there I should say about six or seven times. At the time I visited there I was acting under instructions of Sergeant Gorham, trying to purchase liquor there. I would go as far as the head of the stairs, and be told it was a private house, I was in the wrong place, or something to that effect. I know the man I met there now—that is, I know now [368] who they were who refused to serve me liquor. I was able to go to the head of the stairs of the premises. I could not say what was going on inside of the flat. I only could see the front view of the flat. I was a member of what is referred to as the special detail of Police District 5, and have been such about eight or nine months. That detail is made up of Sergeant Gorham, commanding, Officer Maguire and myself.

(Testimony of William J. Ward.)

Cross-examination.

(By Mr. GILLIS.)

The first time I visited 1249 Polk Street was the latter part of March. I could not say what time in the latter part of March, just what day. I know it was in the latter part of March, and during the month of April, I believe. I could hardly say whether it was before the 28th or after the 28th of March. I think it was about the 12th or 14th when I was detailed with Sergeant Gorham, and I imagine it was ten or fifteen days after that I went into that place. I could not say whether it was before or after the 28th for sure. I know it was in the latter part of March I was there. I don't know to my knowledge if Sergeant Gorham had been there before I went there. The first time that place was called to my attention by Sergeant Gorham was when he sent me in there to try and purchase liquor. I would not place that definitely, only the latter part of March, some time. That is the best I can do. I rang the bell. I didn't ring three bells, no specific bell, I rang one, two, every time I was there; I didn't ring any specific amount of bells. I switched the bells. The first time I believe I saw one who I have since known to be Mahoney. I tried to appear as though I was known to him, had been there before, and tried to walk past him, and I told him I wanted to get a drink, and he said, "You are in the wrong place." I got to the head of the stairs [369] and I said to him, "I want to get a drink." He said, "You are in the wrong place;

(Testimony of William J. Ward.)

no drinks here; this is a private house." He said, "This is a private house." I said—well, I told him he must be mistaken, I had been there *fore*. He said, "No, you have not; I have not seen you before; you will have to walk out." So I turned around and walked out. There were three doors that I could see in the hallway; a couple of times I was in one of the doors was open. I could not say that it was on the first visit. I don't remember whether the door was open or not. I made a report to Sergeant Gorham. He told me when I first went in if I found a violation of law or any liquor in sight, to seize it and place them under arrest. I didn't see any. I saw nothing but an empty room, with the door open. The other doors I believe were closed. The door just at the head of the stairs. I don't know how it was furnished. I could merely see in through the door. I just saw a sort of center table and a couple of chairs; that is all. I went there the next time about a week afterwards. I kind of alternated visits. He sent me up some time in the afternoon and some time in the night. The second time I believe I saw the man who I know since is Birdsall. I had seen him before. I said to him the same as I told Mahoney. I wanted to get a drink. I didn't call him by name. I didn't know who he was. Sergeant Gorham didn't tell me who was in there. He didn't tell me the name of the man who ran the joint. He merely told me it was suspected bootlegging place, to go up and try and buy a drink. He didn't tell me

(Testimony of William J. Ward.)

Birdsall was in there. He didn't tell me he had been in there and saw Birdsall. He didn't tell me that I would have any trouble getting in. All I would have to do was to make out I knew Birdsall. He told me to appear as though I had been there before and got a drink. That is all. Birdsall told me the same as Mahoney. He said, [370] "You are in the wrong place; there is no drink here; this is a private house." I don't know if he lived there. He just said it was a private house. I could not say specifically whether I saw any of the doors open on this occasion, as to each visit, whether they were open; sometimes they were open, and sometimes closed. On my visits I didn't see any of the doors open besides the one I testified to. That is the only door I ever saw open, just the one in the center. I saw that open on more than one occasion. I never saw anybody in there. I went in there to make the buy any time from 2:30 to 4:30 in the afternoon, and sometimes from 8 to 8:30 to 11. I could not give you the exact time of my visits there. I did not keep a memorandum of them. I never made any memoranda as to my visits there. I reported to Sergeant Gorham when I came out. If it was prearranged he would be across the street, where he could see the window in case I came to the window. If I did anything, walked into the room, I could see through the window. So that anybody standing in the front room could see across the street. On the occasions that I visited there those were the only two men I saw,

(Testimony of William J. Ward.)

just Birdsall and Mahoney. When I saw Mahoney or Birdsall on the second time that I went there I said words to the same effect. The visits were arranged so that they would be about a week apart, thinking they would let me in eventually. They always made the same reply to me; always the same thing. They were always in their shirt-sleeves when I was there. I was making visits to other places and getting into most of them, frequently buying drinks. This place I could not make any buy from. I went there in the afternoon, between 2:30 and 4:30, and between and around 11 at night. From 8 to 11. It might have been 4:30, perhaps 5, but I would not place it definitely as to the time.

(R. Tr., Vol. 6, pp. 407–413, inc.) [371]

Thereupon the defendants Gorham, Marron, Birdsall, Mahoney and Kissane announced that they rest their cases.

TESTIMONY OF C. S. MATTHEWSON, FOR THE GOVERNMENT (IN REBUTTAL).

C. S. MATTHEWSON, a witness called for the United States, in rebuttal, and sworn, testified as follows:

Direct Examination.

(By Mr. GILLIS.)

I am in the undertaking business at 1550 California Street. I know Mr. Brand, one of the defendants in this case. I am vice-president and general manager of the company. He has been around the firm during the year 1924. He hasn't really been

(Testimony of C. S. Matthewson.)

working there,—that is, he has been helping out in a way, of his own accord. He has been there for several months. He has drawn no real salary. I have not paid him any commission within the last five or six months, that I can recall. During the year 1924 he had a couple of deaths in his family, I believe his sister-in-law, or a nephew, and a child of one of the relatives, and I believe I allowed him $75, that is, as a sort of discount. That is the only money that I can recall, outside of Thanksgiving I gave him a little, a few dollars for a turkey, and Christmas a few dollars, that is all. He has been there pretty regularly; in the neighborhood of four or five months he has been regular. Up to four or five months ago he didn't work regularly every day, all day long. I didn't keep any regular track of the time he spent each week there. He would come and go. I myself didn't keep any record of his time, because he was not on the regular pay-roll. He has been very regular for the last four or five months. He has been off [372] occasionally, no, hardly ever, with the exception of Sundays.

Cross-examination.

(By Mr. GREEN.)

We have an embalmer working for us as an employee by the name of Hill. He would be more likely to know the exact hours that Brand has spent there than I would, because they were together continuously.

(R. Tr., Vol. 6, pp. 413–415, inc.)

TESTIMONY OF WILLIAM KENLY LATHAM, FOR THE GOVERNMENT (IN REBUTTAL).

WILLIAM KENLY LATHAM, a witness called for the United States in rebuttal, and sworn, testified as follows:

Direct Examination.

(By Mr. GILLIS.)

Q. You have already been sworn in this case, Mr. Latham? Mr. Latham, did you visit 1249 Polk Street the latter part of September, 1924?

Mr. SMITH.—Just a second, so that we may know what our position is. Is this supposed to be rebuttal, or what?

Mr. GILLIS.—Supposed to be rebuttal.

Mr. SMITH.—Object to it on behalf of the defendant Mahoney, on the ground that the Government cannot produce rebuttal on that.

The COURT.—Overruled.

Mr. SMITH.—On the further ground that it is not proper rebuttal, if the Court please, to show that this man was not there. There is nothing to rebut.

The COURT.—I don't understand that.

Mr. SMITH.—I say that there has been no testimony even tending to show that this witness was not at 1249, so there is nothing [373] to rebut.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

Mr. GILLIS.—Q. Your answer?

A. I was, yes, sir.

(Testimony of William Kenly Latham.)

Q. Do you remember about when that was, approximately? A. Sir?

Q. Do you remember approximately when that was?

A. Well, I could not give the exact date; it was around the latter part of September.

Q. What part of the flat did you go into?

A. I went into the rear part of it.

Q. The kitchen? A. Yes, sir.

Mr. SMITH.—So that the record may show the entire matter without further objection, may our objection run to all this testimony?

The COURT.—No, I don't think so. I don't know what will be developed. You make your objections, and the Court will rule.

Mr. GILLIS.—Q. Who did you see in the kitchen?

Mr. SMITH.—Objected to as improper rebuttal.

The COURT.—Overruled.

Mr. SMITH.—Also as incompetent, irrelevant and immaterial.

The COURT.—Overruled.

Mr. KELLY.—The same objection.

The COURT.—Overruled.

Mr. SMITH.—Exception.

Mr. KELLY.—Exception.

Mr. GILLIS.—Q. At that time, who did you see in the kitchen?

A. I saw that gentleman over there. I do not know his name.

Q. Can you point out, as they sit there?

(Testimony of William Kenly Latham.)

A. That one sitting next to Kissane, on this side.

Q. On this side? A. Yes, sir. [374]

Q. That would be the side near the Judge's bench?

A. Yes, sir.

Q. Among the defendants?

The COURT.—Who is that?

Mr. GILLIS.—Let the record show that that is Mr. Mahoney.

The COURT.—That is correct?

Mr. SMITH.—That is correct.

Mr. GILLIS.—Q. What other defendants did you see there at that time?

A. While I was in there, that gentleman sitting on the other side of Mr. Kissane came in.

Q. That is the side nearer the door?

A. Yes, sir.

Mr. GILLIS.—The record may show that that is the defendant Gorham.

The COURT.—That is correct?

Mr. SMITH.—Yes, sir.

Mr. GILLIS.—Q. He came in at that time, did he? A. Yes, sir.

Q. And what was on the table in the kitchen?

A. Well, there was a bottle and some glasses.

Mr. SMITH.—We will object to that as improper rebuttal.

The COURT.—Overruled.

Mr. SMITH.—Note an exception.

Mr. GILLIS.—Did you see any liquor there?

A. I did.

Q. Was there any poured out?

(Testimony of William Kenly Latham.)

A. I poured out some, myself.

Q. That was it? A. Gin.

Q. Poured out of a regular gin bottle?

A. Yes, sir.

Q. What was the defendant Mahoney doing?

A. He just came in and walked around. He didn't do anything that I could definitely state.

Q. Did Gorham have any conversation with him?

A. Well, they did, but I didn't pay any attention to what they said.

Q. You don't remember what they said?

A. I don't; I was disinterested in what was going on. I was there for the purpose [375] of getting a drink, and I went out.

Q. Now, did you notice whether or not there was a cash register in the kitchen?

Mr. SMITH.—Objected to as incompetent rebuttal.

The COURT.—Overruled.

Mr. SMITH.—Note an exception.

A. There was a cash register in there.

Mr. GILLIS.—Q. Did you see any slot machines when you were in there that time?

Mr. SMITH.—The same objection.

The COURT.—The same ruling.

Mr. SMITH.—Note an exception.

A. I did.

Mr. GILLIS.—Q. Where was that?

A. That was in what I should take to be, had been the dining-room of this flat.

Q. Near the kitchen, was it? A. Yes, sir.

(Testimony of William Kenly Latham.)

Q. Now, from the conversation that occurred between Gorham and Mahoney, did it appear to you that they knew each other, and were on friendly terms, or otherwise?

Mr. TAAFFE—That is objected to as calling for the conclusion of the witness.

Mr. GILLIS.—Just how it appeared to him.

The COURT.—Better put it, what was the nature of the relations, as you observed it?

A. Well, they spoke to each other; as to what they said, I couldn't recall.

The COURT.—Q. You mean that Sergeant Gorham there came into the kitchen when you were drinking there, and he was talking with Mahoney?

A. I do.

The COURT.—Go ahead.

Mr. GILLIS.—Q. Did Gorham stay in there for a few minutes

A. To the best of my recollection, I left him there. I went right out and went down the stairs. [376]

Q. After you had had your drink?

A. Yes sir.

Q. Your drink—you poured your drink while he was there? A. Yes, sir.

Mr. GILLIS.—That is all.

Cross-examination.

(By Mr. KELLY.)

This date was the latter part of September. I couldn't give the exact date. I couldn't give you the approximate date. The best way I can put

(Testimony of William Kenly Latham.)

it down, it was the latter part of September. That is the best I could give you. I could not give you the exact time, because I didn't pay any attention to the date. It was in the forenoon. I should judge around 11 o'clock, maybe half-past 11. I could not fix any more definitely than the latter part of September. That is the only time I have seen him in there. I was first subpoenaed to testify in this matter for the Government yesterday afternoon. I was a witness here before testifying to the character of Kissane, and it was after that that I was subpoenaed to give the testimony that I am now giving. I didn't make any admissions that I had been drinking in the place until a few moments ago. I am a stationer out there. My place is 1550 Polk Street, near California. Sergeant Gorham had on a light suit of clothes. He was not in uniform.

(R. Tr., Vol.—, pp. 416–421, inc.)

Thereupon the Government announced that it rest its case. [377]

TESTIMONY OF JOSEPH GORHAM, IN HIS OWN BEHALF (RECALLED IN SURREBUTTAL),

JOSEPH GORHAM, recalled as a witness on his own behalf, in surrebuttal, testified as follows:

Direct Examination.

(By Mr. KELLY.)

I heard the testimony of the witness who has

(Testimony of Joseph Gorham.)

just left the stand. I had never seen him before until yesterday. I heard him state that I was in the kitchen at 1249 Polk Street on a date that he fixed in the latter part of September, at about 11 o'clock in the morning, and that he in my presence poured out gin and drank it, and that at the same time in the presence of Mr. Mahoney. That statement is untrue. My vacation period was from the 2d to the 16th of September. My days off were the 1st to the 17th. I was off the first 17 days of September. I came back to work on the 18th. From the 18th, when I came back to work, until the latter part of September, I was not in that place. My usual routine duties in the morning hours of my watch have been in the police court every morning at 10:30, practically every morning that I have been detailed in that company. On an average of about 200 arrests a month, attending to the complaints and arrests made by me. That was throughout the month of September, as with every other month during my detail. The day I wouldn't be in the Police Court would be an exceptional day. I testified when I was on the stand before that the purpose of my visits to the place was to determine whether any violations of the law had been committed in there. If instances had occurred I would certainly have effected an arrest. If I saw the instance depicted by the witness Latham I would have made an arrest. [378]

(Testimony of Joseph Gorham.)

Cross-examination.

(By Mr. GILLIS.)

During the period of seven months I don't think there were ten days that I was not in the Police Court. I would say that there were days, however, when I was not in the Police Court, but very few.

Mr. KELLY.—Prior to Mr. Taaffe's addressing the Court, I move the Court, on behalf of the defendant, Joseph Gorham, for a directed verdict on the ground that the evidence is insufficient as a matter of law to sustain a contrary verdict.

The COURT.—I think the situation is stronger against you than it was before. The motion is denied.

Mr. KELLY.—Note an exception.

(R. Tr. Vol. —, pp. 421–423, inc.)

Mr. TAAFFE.—May it please your Honor, on behalf of the defendant Kissane, we renew the motion which we before made, for an instructed verdict of Not Guilty, or an advised verdict or whatever procedure there is in reference to that, and we also wish to make the motion, if the Court please to exclude all the testimony that has been offered by the Government, with regard to the connection of the defendant Kissane to this matter, in any way, shape or form; and I would like, if the Court pleases, an opportunity to briefly present it.

The COURT.—Mr. Taaffe, I wouldn't take any time over that. I am satisfied, I have studied the matter very carefully, I am satisfied it is a matter for the jury. You couldn't change me on that. The motion is denied.

Mr. TAAFFE.—I would be only about two minutes.

The COURT.—Well, go ahead. Be as brief as you can.

Mr. TAAFFE.—Does your Honor wish this argument to be made in the presence of the jury?

The COURT.—Whichever you prefer. You may step outside.

(The jury then withdrew from the courtroom.)

The COURT.—I will deny the motion.

Mr. TAAFFE.—I will take an exception. [379]

Thereupon, counsel for the Government and counsel for the defendants announced that they had *rest* their cases.

The above constitutes all the evidence, oral and documentary, introduced and admitted by the Court on behalf of the United States and on behalf of the defendants.

Thereafter the case was argued by the attorneys for the United States and by the attorneys for the defendants.

Thereupon, the Court charged the jury as follows: [380]

CHARGE TO THE JURY.

The COURT.—(Orally.) Gentlemen: The Court wants to add its thanks to those which have been given to you by counsel on both sides for your attention in this matter. It is by no means pleasant to the Judges of this court to keep business men away from their duties for so long a period of time; but in this particular case I think that you realize that necessarily the matter is of supreme importance; I say "supreme importance," for the very simple reason that it involves the whole question of the enforcement of a statute which is the subject of conversation and controversy at every fireside, and every dinner table throughout

the length and breadth of the land. That necessarily leads me to warn you again, as I have so often done, that you are the sole and exclusive judges of the facts of this case, that your function and the function of the court are entirely separate and distinct. I have no desire, nor is it a part of my duty, to do anything more than to lay down to you, in the best manner in which I am advised, what I conceive to be the law of the case. When I have done that, my duty is at an end, and then it is for you to determine what the facts are, and, having determined those facts, determine in your minds whether under that law they are sufficient to bring in a verdict either of guilty or not guilty against each one of these defendants.

If, during the course of the trial, there has been anything said by the Court, either in passing upon or ruling upon any question of evidence, objection or motion, or if hereafter, in discussing certain phases of the evidence and its applicability to the law of the case, I shall say anything about it, I want you to understand that in no manner, shape or form, do I mean to intimate [381] anything whatsoever as to the credibility of any witness, or the truth or falsity of anything that has been sworn to; that is, for you to determine, and I am satisfied that you will give all matters that have been presented to you here from the lips of the witnesses, and documentary evidence, such consideration as the importance of the case to the people of this State and the United States, and to these defendants, seems to warrant.

The Grand Jury of this district has presented here an indictment against seven defendants. One of them, Hawkins, has never been apprehended, and, of course, you do not have to find any verdict as to him. As to the other six, however, you must find each one of them either guilty or not guilty of the charge. The indictment, however, gentlemen, as I have so often explained to you, is not in any manner to be taken by you as any evidence in the slightest degree of the guilt of these defendants. The indictment is the mere form by which, under the constitution and laws of the United States, a charge is presented against a citizen for investigation by the Court, and for final determination by a trial jury of his own selection. Therefore, you are not in any manner to consider it as any evidence whatever that these men are guilty. On the contrary, as I have so often explained to you, these men, in spite of the indictment, stand before you, at the outset of the trial, clothed with the presumption of innocence; that presumption accompanies them, gentlemen, throughout all of the stages of the trial, until the last juror has given his last ballot in the jury-room. It is not a mere form of speach, nor a fiction of law, but it is a real thing, fundamental under our constitution, that any man charged with crime is presumed to be innocent. That presumption, gentlemen, can only be removed by evidence which satisfies your minds upon every material point to a moral certainty and beyond all [382] reasonable doubt.

A moral certainty means that evidence must be presented of a character and to a degree and in quantity which would ordinarily produce conviction in an unprejudiced mind.

A reasonable doubt means exactly what the term "reasonable doubt" implies, that is to say, it is the kind of doubt which would influence you in the most important affairs of your own lives.

These men are charged with a conspiracy; they are charged with having entered into a combination, confederation or conspiracy to bring about a violation of the so-called National Prohibition Act; but, mark this, gentlemen, they are not charged with a violation of the National Prohibition Act, and however much you may be convinced from the evidence that these defendants, or any of them, or all of them may have violated, even time and again, the National Prohibition Act, they are not to be convicted on that, because they are not on trial for that, but only for a conspiracy.

Now, then, conspiracy, as such, is made a crime by statute of the United States long in existence, known as Section 37 of the Criminal Code of the United States. Something has been said here in argument to the effect that it was never the intention of Congress that men who had violated the National Prohibition Act should be charged under this section. In the first place, gentlemen, you and I are bound to find the intention of Congress from its enactments, and not from the arguments of counsel, or what one person or individual may

think about it. Congress has declared in so many words, as follows:

"If two or more persons conspire, either to commit any offense against the United States, or to defraud the United States in any manner, or for any purpose, and one or more of such parties [383] do any act to effect the object of the conspiracy, each of the parties to such conspiracy is guilty," etc.

"A conspiracy is formed when two or more persons agree to do an unlawful act; in other words, when they combine to accomplish, by their United action, a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means; and the offense is complete when one or more of the parties so agreeing together does any act to effect the object of the conspiracy.

"To constitute a conspiracy, it is not necessary that two or more persons should meet together and enter into an explicit or formal agreement for an unlawful scheme, or that they should directly, in words, or in writing, state what the unlawful scheme is to be, or the details of the plan or means by which the unlawful combination is to be made effective. It is sufficient if two or more persons, in any manner, or through any contrivance, come to a mutual understanding to accomplish the common and unlawful design. Where an unlawful end is sought to be effected, and two or more persons, actuated by a common purpose of accomplishing that end, work together in furtherance of the

unlawful scheme, such persons become conspirators, although the part which any one of them is to take in the conspiracy is a subordinate one, or is to be executed at a remote distance from the other conspirators.

"In determining the question of the existence of a conspiracy, you will take into consideration the relation of the parties to one another, their personal and business association with each other, and all the facts in evidence that tend to show what transpired between them at and before the time of the alleged combination, as well as the acts performed by each party subsequent to such alleged combination in respect to the subject matter of the [384] alleged conspiracy.

"A conspiracy is rarely, if ever, proved by positive testimony. When a crime is about to be committed by a combination of individuals, they do not act openly, but covertly and secretly. The purpose of the combination is known only to those who enter into it, and their guilt can generally be proved only by circumstantial evidence. The common design is of the essence of the charge, and this may be made to appear when the defendants steadily pursue the same object, whether acting separately or together by common or different means, all leading to the same unlawful result.

"To constitute the offense of conspiracy which is made punishable by the statute, there must be not only the conspiring together by the parties, but the formation of the conspiracy must be followed by an act done by one or more of the parties to the

conspiracy to effect its object. So, if you should find that the defendants, or some of them, conspired together, as charged in the indictment, to commit the offense, you will then inquire whether the defendants, or either of them, did any of the acts charged in the indictment as constituting acts to effect the object of the conspiracy.

"The act must be one, you will observe, to effect the object of the conspiracy. It must not be one of a series of acts constituting the agreement, or the conspiring together, but it must be a subsequent, independent act, following a completed agreement, and done to carry into effect the object of the combination. Such acts constitute what are known as overt acts in the law of conspiracy.

"If you find that a conspiracy existed, as alleged in the indictment, and that some one or more of the overt acts were committed, as alleged, the question then follows: Were the defendants [385] on trial, or some of them, connected with that conspiracy as parties thereto? Mere passive knowledge of the illegal action of others is not sufficient to show complicity in the conspiracy. Some active participation is necessary. Co-operation in some form must be shown. There must be intentional participation in the transaction, with a view to the furtherance of the common design and purpose. To establish the connection of either of the defendants with the conspiracy, such connection must be shown by facts or circumstances, independent of the declarations of others; that is, by his own acts, conduct or declarations. And, until

this fact is thus established, he is not bound by the declarations or statements of others. The principle of law and rule of evidence is that when once a conspiracy or combination is established, and the defendant is shown by independent evidence to be a party thereto, then he is bound by the acts, declarations and statements of his co-conspirators done and made in furtherance of the conspiracy.

"So, in considering the testimony given as to the acts, declarations and statements of either one of the defendants when other defendants were not present, you are to understand that that testimony was submitted to you for the purpose of showing in the first instance that there was a conspiracy formed and existing, and that the person or persons making the declarations, statements or communications, were parties to it; that the alleged connection of any one of the defendants with the alleged conspiracy, if any existed, must be shown by facts or circumstances independent of statements of other defendants in his absence; and that, when once that connection is thus shown, then he becomes affected and bounded by the declarations and acts of other parties to the conspiracy, if any, made and done in furtherance of the common enterprise, and during his connection therewith. [386]

"The law regards the act of unlawful combination and confederacy as dangerous to the peace of society, and declares that such combination and confederacy of two or more persons to commit

crime requires an additional restraint to those provided for the commission of the crime, and makes criminal the conspiracy, with penalties and punishments distinct from those prescribed for the crime which may be the object of the conspiracy. You will readily understand why this is true. A conspiracy becomes powerful and effective in the accomplishment of its illegal purpose, in proportion to the numbers, power, and strength of the combination to effect it. It is also true that it involves a number in a lawless enterprise, it is proportionately demoralizing to the well-being and character of the men engaged in it, and as a consequence, to the safety of the community in which they belong.

Now, gentlemen, there are five persons here who are charged with this conspiracy.

Mr. O'CONNOR.—Six, if your Honor please.

The COURT.—Six persons, one of whom, however, is not on trial.

Mr. O'CONNOR.—There are on trial six defendants.

The COURT.—There are seven persons charged, one of whom is not on trial. There are six persons, therefore, concerning whom you must determine their guilt or innocence.

Chronologically speaking, the first one who should be considered by you is the defendant Walter Brand. In determining whether or not he is guilty of conspiracy, you must determine whether or not, from all of the evidence, there was any agreement or combination, of any kind or

character, between him and the defendant who is known as Eddie Marron. If you should find from the evidence that all that was done between them was that Mr. Marron loaned the sum of $1000 to Mr. Brand, without knowledge of the purpose for which it was to be used, and that after Mr. [387] Marron came in there, if you should find he did come in there, that Mr. Brand in no manner participated in the conduct of an unlawful business at 1249 Polk Street, then you must find him not guilty. If, on the other hand, you find that the sum of $1,000 was loaned by Mr. Marron to Mr. Brand for the express purpose and with the knowledge that it was to be used in the purchase or conduct of a business in violation of the National Prohibition Act, then I instruct you that that would amount to a conspiracy between the defendant Brand and the defendant Marron.

Likewise, if you should find from the evidence that even if the original loan was without knowledge or understanding that it was to be used for the conduct of an illegal business, yet if you should find from the evidence that a part of that money was paid, or, rather, advanced to Mr. Brand by Mr. Marron after he knew that he was using it for the purchase, or in the conduct of an illegal business, that would constitute a conspiracy. Likewise, if you should find from the evidence that after the loan had been made there was a participation by Mr. Marron with Mr. Brand in the conduct of this business, even to the extent that the amount should be paid back to Mr. Marron by

Mr. Brand from the proceeds of the business, with full knowledge on the part of Mr. Marron that it was being conducted as an illegal business, that likewise would constitute a conspiracy.

So far as the defendants Marron, Mahoney and Birdsall are concerned, if you find from the evidence that those three defendants participated together in any manner in the conduct of a business at 1249 Polk Street, for the sale of intoxicating liquor as a beverage, then I instruct you that that would constitute a conspiracy as I have heretofore defined it to you. [388]

If you find that the defendants Marron and Birdsall had any sort of an agreement, either by which Mr. Marron was to receive the entire profits and pay to Mr. Birdsall the sum of $20 a day, or if you should find that their agreement was, or that their understanding was, either express or implied, that Mr. Birdsall should receive $20 a day, and Mr. Marron certain other money per month, and then the profits were to be divided, that would constitute a conspiracy as between those two.

So far as the defendant Mahoney is concerned, if you find from the evidence that he was engaged as a bartender there, and had received therefor a compensation, and that he knowingly entered into the sale of the liquor at that place for the purpose of providing the profit for either Mr. Marron or Mr. Birdsall, I instruct you that Mr. Mahoney is equally guilty of a conspiracy with Mr. Birdsall and Mr. Marron.

Now, gentlemen, evidence has been introduced here of three places other than 1249 Polk Street, one on Sacramento Street, one on California Street, and one on Steiner Street. Evidence has been presented to you to the effect that quantities of liquor were found in those three places, and that one of the defendants, Marron, was in charge of and caused that liquor to be stored there. Evidence has been presented to you likewise to the effect that the same kind of liquor which it is alleged was sold at 1249 Polk Street was kept in store at those three other places. It is for you to determine whether those facts are true. If they are true, and you find that a conspiracy existed, then I instruct you that these would constitute overt acts, and would be binding upon such persons, if any, as you may find were participants in or parties to the conspiracy.

There has been admitted in evidence here a statement made by [389] the defendant Brand to some of the officers of the law. That statement was made after October 3d, and I instruct you, gentlemen, that for the purposes of this case, if there was a conspiracy that conspiracy ended on the 3d of October, and, therefore, the statement made by Mr. Brand, after October 3d, to the officers of the law, is evidence against Mr. Brand alone, and cannot be considered by you with reference to any of the other defendants.

There was also a statement made to Mr. Oftedal by Mr. Mahoney after the 3d of October. That statement, gentlemen, can be considered by you only as evidence against the defendant Mahoney,

and not as evidence against any of the other defendants.

However, there is a clear and sharp distinction that you must keep in mind concerning statements made before October 3d, and those made after October 3d, because the law, gentlemen, is clear, as enunciated in the part that I read to you, that any statement made or any act done by any one of the persons who you may find were parties to the conspiracy, and before the end of the conspiracy, is binding upon all of them and may be considered by you as evidence against all of them. On the contrary, anything said or done by any one of them after the conspiracy has ended is not binding upon anyone except the person who did it or said it. I should qualify, however, the statement or the instruction, that statements made before the end of the conspiracy are binding upon all in this manner, that they must be statements made or things done in furtherance of the conspiracy.

I come now, gentlemen, to the two police defendants. Congress, by the necessary two-thirds, declared and adopted the Eighteenth Amendment to the Constitution of the United States. [390] That amendment, as the Constitution itself specifically provides, was, of course, of no force or effect until it had been submitted to the legislature of three-quarters of the States. That was done, and more than three-quarters of the States of the Union, including the State of California, ratified and confirmed that amendment, and thus, by automatic provisions of our fundamental law, it has become a part

of *the* binding upon every citizen, the length and breadth of the land. That amendment to the Constitution provides by its terms, not only that the duty is devolved upon Congress to pass a statute to carry out the intent and purposes of that amendment, but likewise it provides that the States, themselves, might, by the adoption of local statute, provide for carrying it into effect. Accordingly, the legislature of the State of California passed a statute adopting *in toto* the National Prohibition Act, familiarly known as the Volstead Act, with all of its inhibition and exceptions, and all its pains and penalties. That statute thus passed by the legislature, was submitted to the vote of the people of the State of California, under our constitutional provision for a referendum, and a majority of the people of the State of California voted in favor of that statute, by which the Volstead Act was adopted as a part and parcel of our own set of laws. Of course, the great majority of men are opposed to larceny, but, unfortunately, there is a small minority who will steal. A great majority of men and women are opposed to forgery, but there is still a small minority who will sign other people's names to checks. As to this particular statute, there is not only a minority, great in number, but there is a minority respectable and convinced and believing that it ought never to have been the law, and frequently considering themselves aggrieved [391] to the fullest extent by the fact that it ever became a law. But, gentlemen, these considerations, which are proper enough for the rostrum of the legislative

hall, for private propaganda against this law, can find no room for so much as an echo in this place. Here our duty is plain. We have taken an oath to do that duty, and to support the Constitution of the United States, and we would be false and recreant to that duty if we did not do it according to the law.

Now, that statute, passed by the State of California, to say nothing of the statute of the United States, places or imposes the duty upon every peace officer to use his best endeavors to enforce that law, like every other law, and, where he finds that persons are transgressing it, to see that they are arrested and prosecuted in accordance with that statute and the statute of our Congress. In considering, therefore, the case of these two police officers you must, of course, as I know enough about you to know that you will, eliminate from your minds, either for or against, your personal opinions with regard to whether or not it ought to be the law, and start out with the proposition that it was the duty of this sergeant and patrolman, who are before you, to enforce that law, and to investigate and arrest if they found any person transgressing it. I do not mean by that, and you are to keep this distinction carefully in mind, that any man can be held guilty of conspiracy because he is an officer of the law and may have been merely careless or derelict in his duty; that might be a matter for investigation by the authorities of his own department, but it is a matter with which we have no concern; that is to say, mere negligence, or even mere shutting a man's eyes to a violation of the law, would not constitute

him a conspirator; but if, on the other hand, he knew that the law [392] was being violated, and either by passive connivance or by actual agreement with the persons who were transgressing that law, he would be guilty of conspiracy with them, whether he received any compensation therefor or not. You are to determine, therefore, gentlemen, from all of the facts and circumstances of this case, whether or not these two police officers either actively or tacitly, even without a word being spoken, agreed with these other defendants, or any of them, to permit liquor to be sold at that place, or to be taken into it, or transported to it, or there possessed, or there possessed for the purpose of sale. If you find that there was such an agreement, tacit or otherwise, then these two defendants are guilty of conspiracy, bearing in mind, however, that mere carelessness or negligence on their part in enforcing the law would not be sufficient to constitute them conspirators. In considering the question, gentlemen, you are entitled to consider all of the evidence presented here by the Government, such as the reports made by these two officers in regard to the number of times that they visited that place; you are to take into consideration its proximity, if you find it to be so, to the place where they had their headquarters; you are to take into consideration, if you find it to be a fact, the large quantity of liquor that must have been taken into the place, the large number of persons, if you find that there was a large number, who visited the place, and all of the facts and circumstances which you think may bear

upon the question as to whether or not there was any understanding between the officers and the other persons, that this place should be allowed to run without molestation.

The defendants Patrolman Kissane and Sergeant Gorham, have taken the stand in their own behalf, and have positively denied [393] that they permitted that place to run, or that they had it within their power to stop it if they had wanted to. Under our system of law they were entitled to take the stand in their own behalf, and you are to give to their testimony, gentlemen, the same consideration that you would the testimony of any other witness; that is to say, you must weigh their testimony and determine their credibilty from their appearance, their manner on the stand, whether or not their testimony is consistent in itself, consistent with the other facts of the case, or any admissions or documents that may have been presented to you; of course, bearing in mind that they have an interest in the outcome of the case.

The same consideration applies to the defendant Brand.

The other defendants, however, have not taken the stand in their own behalf. Under our system of laws, that is absolutely their privilege. No man need take the stand in his own behalf, unless he so desires, and not the slightest inference is to be drawn by you against these defendants, from the fact that they did not take the stand; in other words, you are to dismiss that matter entirely and absolutely from your minds.

Now, gentlemen, I come to this so-called little gray book. If you find from the evidence the first part of that book was kept by the defendant Brand, you may consider anything that you may find in it as evidence against him, that is, in the first part of it, against him, and against him alone. If, however, you should find that the defendant Marron in any manner participated or insisted upon the keeping of that book, or entered into any of the profits as shown by that book, then you may consider that first part, I think it is the first 34 pages, also as against the defendant Marron.

I come now to the second part of the book, or that part which Mr. Heinrich testified was in the handwriting of the defendant [394] Marron. If you find that that book was kept by the defendant Marron from page 34 on, then you may consider the entries in that book from that page on as evidence against him.

Now, gentlemen, there occur in that book, as shown by the exhibit which was on the board yesterday, various entries with regard to the defendants Kissane and Gorham. At the very outset you must determine whether or not the Kissane mentioned in that book is the Kissane who is a defendant here. Of course, if you are not satisfied to a moral certainty and beyond a reasonable doubt that it refers to the same Kissane who is here, you will not consider it at all. Upon the other hand, if you do find the Kissane on trial here is the same person mentioned in that book, then the instructions which I will give you later will apply. The same thing as

to the defendant Gorham. If you determine from the evidence that some other Gorham is meant, you will not consider it at all.

Now then, as I have read to you heretofore, the statements of a co-conspirator are evidence against those persons associated with him in the conspiracy only after a conspiracy has been established. If you should find that the entries in this book were kept in the regular course of business, however illegal and contrary to law that business may be, and you should find that the evidence warranted you in finding that there was any combination or agreement, tacit or otherwise, for these two police officers to allow that place to run, then you are entitled to take into consideration all entries in that book to the effect that one of the expenses of the place was this money which is alleged to have been paid to Sergeant Gorham and Kissane. Of course, gentlemen, no man is to be convicted of a crime because somebody writes his name in a book. But if you find three things, first, [395] that these entries of Kissane and Gorham were the Kissane and Gorham here on trial; secondly, that the book was kept in regular course of business as showing as a part of the expenses the payment of money to these officers; and, third, if you find that there was any tacit or other understanding that that place was to be run without police interference, then you may consider these entries as bearing upon the guilt or innocence of the defendants Gorham and Kissane, or either of them.

The term "reasonable doubt," gentlemen, is not a mere figure of speech, nor is it to be lightly looked upon by the jury. The right of a defendant charged with a crime to have his guilt established to a moral certainty and beyond a reasonable doubt is a substantial right, given by law, which must be respected by courts and juries.

If two inferences can be drawn from a given act or circumstance, or from any number of given acts or circumstances, one inference being that of guilt and the other that of innocence, it is your duty to draw the inference of innocence and not that of guilt.

Much of the evidence here has necessarily been circumstantial. The law in regard to circumstantial evidence is as follows: In order to justify a jury in finding a verdict of guilty based upon circumstantial evidence, the circumstances must not only be consistent with the guilt of the defendant, but they must be inconsistent with any other reasonable hypothesis that can be predicated on the evidence; or, stated in another form, it is not sufficient that the circumstances proved coincide with, account for, and, therefore, render probable the hypothesis of guilt asserted by the prosecution, but they must exclude to a moral certainty and beyond a reasonable doubt every other hypothesis except the single one of guilt, or the jury must find the defendants not guilty. [396] That, of course, however, gentlemen, does not mean that men may not be convicted on circumstantial evidence. Very frequently circumstances speak stronger than any pos-

sible evidence that could fall from the lips of witnesses, and in accordance with these instructions, it is for you to determine calmly, dispassionately, and with no feeling whatsoever, either of sympathy for the defendants, or, on the other hand, of any rancor or prejudice of any kind against them, whether or not in your opinion the facts as produced here are sufficient to a moral certainty and beyond a reasonable doubt to convince you of their guilt.

It requires, gentlemen, an unanimous verdict at your hands. [397]

That the defendants Marron and Birdsall then requested the Court to give their instructions Nos. 1, 3, 12, 16, 17, 18, 23, 24, 26, 27, 29, 30, 31, 35 and 36.

That said instructions were and are in the following words and figures, to wit:

INSTRUCTION No. I.

Gentlemen of the Jury, I charge you that as to the defendant George L. Birdsall, there is not sufficient evidence to support a verdict of guilty, and I therefore instruct you to acquit the said defendant George L. Birdsall.

INSTRUCTION No. III.

Gentlemen of the Jury, I charge you that as to the defendant Joseph E. Marron, there is not sufficient evidence to support a verdict of guilty, and I therefore instruct you to acquit the said defendant Joseph E. Marron.

INSTRUCTION No. XII.

Mere probabilities, much less possibilities, conjectures and suspicions, are not sufficient to warrant a conviction, nor is it sufficient that the greater weight or preponderance of the testimony supports the allegations of the indictment, nor is it sufficient that upon the doctrine of chance it is more probable that a defendant is guilty.

INSTRUCTION No. XVI.

The defendants are, and each of them is, clothed with the presumption of good character and this presumption of good character is a right to which they are, and each of them is, entitled, and of which they, or any of them, cannot be deprived under the law until guilty intent is established to a moral certainty and beyond all reasonable doubt. [398]

INSTRUCTION No. XVII.

The defendants in this case are entitled to the independent judgment of each and every juror who has been selected to try them. It is one of the fundamental principles of this government, a principle that has been adopted for the protection of the people that twelve men shall constitute a jury and that no man may be convicted of any offense unless the judgment of each and all of such twelve men shall concur in the conviction that to a moral certainty and beyond every reasonable doubt the defendant is guilty of the offense charged against him. If, therefore, any one or any number of you, after carefully deliberating upon the evidence

in this case, under the instructions of the court, shall be of the opinion that the defendants have not been proven guilty by the evidence, to a moral certainty and beyond every reasonable doubt, those jurors entertaining such opinion should vote in favor of acquittal and should adhere to that opinion until convinced beyond reasonable doubt that such opinion is wrong, and they should not be convinced by the mere fact that the majority of the jury differ from them in opinion.

INSTRUCTION No. XVIII.

One individual alone cannot be guilty of a conspiracy. The conspiracy must be proven to a moral certainty and beyond a reasonable doubt, against two or more of the alleged conspirators, to justify a verdict of guilty. If, therefore, the evidence does not show, to a moral certainty and beyond a reasonable doubt, that any two or more of the defendants did enter into the conspiracy alleged in the felony indictment, your verdict must be not guilty [399] as to all of the defendants.

INSTRUCTION No. XXIII.

I instruct you, gentlemen, that expert witnesses are generally but ready advocates of the theory upon which the party calling them relies, rather than impartial experts upon whose superior judgment and learning the jury can safely rely. Even men of the highest character and integrity are apt to be prejudiced in favor of the party by whom they are employed, and, as a matter of course, no expert is called until the party calling him is

assured that his opinion will be favorable. *Such evidence should be received with great caution by the jury.*

(Gribsby vs. Clear Lake Water Co., 40 Cal. at page 405.)

INSTRUCTION No. XXIV.

The testimony of experts is by no means conclusive and when offered cannot prevent the jury from comparing the documents with a view to question their similarity and it may wholly disregard their testimony and exercise its own judgment.

(Castor vs. Bernstein, 2 Cal. App. 704.)

INSTRUCTION No. *XVI.*

I charge you that before you can find the defendant George L. Birdsall guilty of the offense charged in this indictment, you must first find that he was a party to the alleged conspiracy set out therein. If you have a reasonable doubt as to whether or not he was a party to such alleged conspiracy, it will be your duty to return a verdict of not guilty as to him. [400]

INSTRUCTION No. XXVII.

I charge you that before you can find the defendant Joseph E. Marron guilty of the offense charged in this indictment, you must first find that he was a party to the alleged conspiracy set out therein. If you have a reasonable doubt as to whether or not he was a party to such alleged conspiracy, it will be your duty to return a verdict of not guilty as to him.

INSTRUCTION No. XXIX.

I charge you that participation in a conspiracy without knowledge of its existence or knowledge of a conspiracy without participation therein is not sufficient to warrant a conviction. Therefore, if you find that the defendant Charles Mahoney knew that this conspiracy was in being but did not participate therein you must find him not guilty. Likewise if you find that Charles Mahoney took any part in this alleged conspiracy but did not have knowledge of its existence you must find him not guilty.

INSTRUCTION No. XXX.

I charge you that participation in a conspiracy without knowledge of its existence or knowledge of a conspiracy without participation therein is not sufficient to warrant a conviction. Therefore if you find that the defendant Joseph E. Marron knew that this conspiracy was in being but did not participate therein you must find him not guilty. Likewise if you find that Joseph E. Marron took any part in this alleged conspiracy but did not have knowledge of its existence you must find him not guilty. [401]

INSTRUCTION No. XXXI.

I charge you that participation in a conspiracy without knowledge of its existence or knowledge of a conspiracy without participation therein is not sufficient to warrant a conviction. Therefore if you find that the defendant George L. Birdsall knew that this conspiracy was in being but did not

participate therein you must find him not guilty. Likewise if you find that George L. Birdsall took any part in this alleged conspiracy but did not have knowledge of its existence you must find him not guilty.

INSTRUCTION No. XXXV.

The defendants are not on trial for violating any provisions of the National Prohibition Act but for conspiring to violate the National Prohibition Act.

Particular violations of the National Prohibition Act are therefore not sufficient of themselves to warrant a conviction.

You must be convinced beyond all reasonable doubt that in addition to any particular violations of the National Prohibition Act that were committed, if there were any so committed, there was in actual fact a conspiracy in existence at the time said acts were so committed.

Particular violations of the National Prohibition Act may, if the circumstances in your opinion warrant, be considered as evidence tending to show such conspiracy, but the inference that there was in reality a conspiracy must be so cogent and compelling when all the evidence is considered as to convince you beyond a reasonable doubt that such conspiracy did actually and in fact exist prior to the commission of National Prohibition Act violations, [402] otherwise your verdict as to the defendants Marron, Birdsall and Mahoney must be not guilty.

INSTRUCTION No. XXXVI.

You are instructed that an accomplice is a person who is liable to prosecution for the identical offense charged against the defendant or defendants on trial in the cause in which the testimony of the accomplice is given.

You are further instructed that a conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to convict the defendant or defendants with the commission of the offense; and I further instruct you that the corroboration is not sufficient it if merely shows the commission of the offense or the circumstances thereof.

That the Court refused to give said instructions, or any of them, to which refusal the defendants Marron and Birdsall then and there noted an exception.

That the defendants Marron and Birdsall excepted to that part or portion of the charge of the Court to the jury as follows, to wit:

"Chronologically speaking, the first one who should be considered by you is the defendant Walter Brand. In determining whether or not he is guilty of conspiracy, you must determine whether or not, from all of the evidence, there was any agreement or combination, of any kind or character, between him and the defendant who is known as Eddie Marron. If you should find from the evidence that all that was done between them was that Mr. Marron loaned the sum of $1,000 to Mr. Brand, without knowledge [403] of

the purpose for which it was to be used, and that after Mr. Marron came in there, if you should find he did come in there, that Mr. Brand in no manner participated in the conduct of an unlawful business at 1249 Polk Street, then you must find him not guilty. If, on the other hand, you find that the sum of $1,000 was loaned by Mr. Marron to Mr. Brand for the express purpose and with the knowledge that it was to be used in the purchase or conduct of a business in violation of the National Prohibition Act, then I instruct you that that would amount to a conspiracy between the defendant Brand and the defendant Marron.

"Likewise, if you should find from the evidence that even if the original loan was without knowledge or understanding that it was to be used for the conduct of an illegal business, yet if you should find from the evidence that a part of that money was paid, or, rather, advanced to Mr. Brand by Mr. Marron after he knew that he was using it for the purchase, or in the conduct of an illegal business, that would constitute a conspiracy. Likewise, if you should find from the evidence that after the loan had been made there was a participation by Mr. Marron with Mr. Brand in the conduct of this business, even to the extent that the amount should be paid back to Mr. Marron by Mr. Brand from the proceeds of the business, with full knowledge on the part of Mr. Marron that it was being conducted as an illegal business, that likewise would constitute a conspiracy."

The defendant Kissane then and there excepted

to that part or portion of the charge of the Court to the jury with reference to tacit acquiescence, which said part or portion. [404]

That the defendants Marron and Birdsall excepted to that portion of the charge of the Court to the jury as follows, to wit:

"Now, gentlemen, evidence has been introduced here of three places other than 1249 Polk Street, one on Sacramento Street, one on California Street, and one on Steiner Street. Evidence has been presented to you to the effect that quantities of liquor were found in those three places, and that one of the defendants, Marron, was in charge of and caused that liquor to be stored there. Evidence has been presented to you likewise to the effect that the same kind of liquor which it is alleged was sold at 1249 Polk Street was kept in store at those three other places. It is for you to determine whether those facts are true. If they are true, and you find that a conspiracy existed, then I instruct you these would constitute overt acts, and would be binding upon such persons, if any, as you may find were participants in or parties to the conspiracy." [405]

of said charge was and is as follows, to wit:

"But if, on the other hand, he knew that the law was being violated, and either by passive connivance or by actual agreement with the persons who were transgressing that law, he would be guilty of conspiracy with them, whether he received any compensation therefor or not. You are to determine, therefore, gentlemen, from all of the facts

and circumstances of this case, whether or not these two police officers either actively or tacitly, even without a word being spoken, agreed with these other defendants, or any of them, to permit liquor to be sold at that place, or to be taken into it, or transported to it, or there possessed, or there possessed for the purposes of sale. If you find that there was such an agreement, tacit or otherwise, then these two defendants are guilty of conspiracy.

That defendant Kissane requested the Court to give his instructions Nos. 2, 3 and 4, which said instructions are as follows:

INSTRUCTION No. II.

You are further instructed that in considering the evidence introduced, in order to determine whether or not a conspiracy was in existence between the defendants on trial here, to violate the terms, conditions and provisions of the Volstead Act, and whether or not the defendants Patrick Kissane and Joseph Gorham conspired with each other and with the other defendants on trial here to effect and consummate the objects of said conspiracy, you must disregard the evidence given with reference to the entries contained in the book marked [406] "Government's Exhibit in evidence Number 3" and give no consideration to the entries therein contained, unless from the evidence introduced, exclusive of the evidence contained in said Exhibit Number 3, you are convinced to a moral certainty and beyond a reasonable doubt that a conspiracy existed between all of the defendants to do the acts charged in said indictments.

INSTRUCTION No. III.

The defendant Patrick Kissane is a police officer and as to public offenses of the degree of misdemeanors he has no authority to make arrests unless armed with a warrant save and except in those cases where the offense is committed in his presence.

(Ferguson vs. Superior Court, 26 Cal. App. 554.)

INSTRUCTION No. IV.

While common repute may be received as competent evidence of the character of the premises conducted at 1249 Polk Street, San Francisco, California, the failure of Patrick Kissane to act upon such common repute in arresting the proprietor or visitors thereof does not constitute a neglect of his official duty.

(Ferguson vs. Superior Court, *supra.*)

That the Court refused to give said instructions, or any of them, to which refusal the defendant Kissane then and there noted an exception.

That the defendant Gorham requested the Court to give his instruction No. I, which instruction is as follows: [407]

INSTRUCTION No. I.

I instruct you that the evidence in this case is insufficient as a matter of law to warrant a conviction of the defendant Gorham, and you are therefore instructed to return a verdict of not guilty as to the defendant Gorham.

That the Court refused to give said instruction,

to which refusal the defendant Gorham then and there noted an exception.

That after the Court had completed its charge to the jury, the jury retired to deliberate upon its verdict, and thereafter brought in a verdict as follows:

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 15,708.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE HAWKINS et al.,

Defendants.

VERDICT.

We, the Jury, find as to the defendants at the bar as follows:

Walter Brand—Not Guilty.

Charles Mahoney—Guilty, with a recommendation that leniency be shown and a fine only imposed.

Joseph E. Marron—Guilty.

George Birdsall—Guilty.

Patrick Kissane—Guilty.

Joseph Gorham—Guilty.

_____,

Foreman.

[Endorsed]: Filed January 13, 1925, at —— o'clock and —— minutes —— M. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [408]

Thereupon, and at said time, the attorney for Joseph Gorham presented to the Court a motion for a new trial on behalf of the defendant Joseph Gorham, and an affidavit and documentary evidence in support thereof, which said motion, affidavit and documentary evidence were and are in the following words and figures, to wit:

In the Southern Division of the District Court of the United States for the Northern District of California, First Division.

No. 15,708.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH GORHAM et al.,

Defendants.

MOTION FOR A NEW TRIAL OF DEFENDANT JOSEPH GORHAM.

Now comes the defendant, Joseph Gorham, and moves the Court that the verdict herein rendered be vacated and a new trial be granted said defendant for the following reasons:

1. That the verdict was contrary to the evidence.
2. That the verdict was contrary to the weight of the evidence.

3. That the verdict was contrary to the law as given to the jury by the Court.

4. That the Court erred in refusing instruction No. I, requested by the defendant Gorham.

5. That the Court erred in admitting evidence contrary to the law.

6. That newly discovered and material evidence has come to light since the trial.

7. Errors of law occurring at the trial, and which errors of law defendant Gorham regularly and [409] *and* duly excepted to.

8. That new evidence material to defendant Gorham has been discovered, which he could not with due and reasonable diligence, produce at the trial.

WHEREFORE, defendant Gorham respectfully prays this Honorable Court that the verdict herein rendered be set aside and that a new trial be allowed.

WILLIAM A. KELLY,
Attorney for Defendant Joseph Gorham.

In the Southern Division of the District Court of the United States for the Northern District of California, First Division.

No. 15,708.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOSEPH GORHAM et al.,
Defendants.

AFFIDAVIT OF DEFENDANT JOSEPH GORHAM IN SUPPORT OF MOTION FOR A NEW TRIAL.

State of California,
City and County of San Francisco,—ss.

Joseph Gorham, being first duly sworn, deposes and *and* says:

My name is Joseph Gorham. I am one of the defendants in the above-entitled proceeding. I am and have been for a number of years past, a Sergeant of Police in the Police Department of the City and County of San Francisco, State of California. I was off duty in said Police Department the first seventeen days of September, 1924. I reported back to duty in said Department on the 18th day of September, 1924. Said seventeen days comprehend my regular days off and my vacation period. My vacation period was spent in Richardson [410] Springs, California, Marysville, California, and Sacramento, California.

I was not at any time during the month of September, 1924, in the premises referred to throughout the testimony in this case, 1249 Polk Street, San Francisco, California. I do not know the witness Latham, who testified during the last few moments of the trial of this case. I never saw him before he appeared as a witness in this Court. I was not in his presence at or about 11 or 11:30 o'clock on any day in the latter part of September, 1924, at said 1249 Polk Street, or at any other time

of any day in September, 1924. I was not in the kitchen of said 1249 Polk Street on any day in the latter part of September, 1924, at or about 11 or 11:30 of such day or on any day at any time of any day of September, 1924, nor was I ever in said kitchen at any time in my life. I did not witness the transaction testified to by said Latham, to wit, the pouring of liquor by said Latham into a glass, the drinking of same by said Latham and the payment by said Latham to one Mahoney, of money therefor.

I was on duty in said Police Department on every day in September, 1924, from the 18th day thereof, to and including the last day thereof. I was in the various Police Courts of the City and County of San Francisco, State of California, on all of the days of September, 1924, commencing with the 18th day thereof, down to and including the last day thereof in connection with the prosecution of cases of defendants arrested by myself and posse, to wit: Officers Maguire and Ward, excepting on the 21st and 28th days of September, 1924, which days were Sundays. I arrived at said Police Court on each of [411] *of* said days at about 10:30 A. M. thereof, and did not leave the same on any of said days until at least 12 M. of said days and often at a later hour.

Following are the records of arrests made by myself and said posse and the dates whereon in connection therewith I was as aforesaid in said Police Courts of said city and county of San Francisco:

"Sept.

18th: Jean Clark, 635 Larkin Street, keeping a house of ill fame and vagrancy.

Ester Sullivan, #635 Larkin Street, inmate of a house of ill fame.

Benjamin Burke, John Nelson, Fred Brown and Thomas O'Hara, visitors to a house of ill fame. Police Court Dept. #1—Judge O'Brien.

Jacquelini Brown (Colored) soliciting prostitution and vagrancy. Geary and Webster Streets, continued until September 25th, 1924. Police Court Dept. #1—Judge O'Brien.

Sept.

19th: Edna Petroza, #213 Elm Avenue, keeping a house of ill fame. Jess Garcia, #213 Elm Avenue, violating the pimping law and Section 476 Penal Code.

William Strong, #213 Elm Avenue, violating the pimping law and contributing to the delinquency of a minor. Police Court Dept. #1—Judge O'Brien.

20th: Margaret Norton, 1548 Market Street, keeping a house of ill fame. Inmate of a house of ill fame and vagrancy.

Helen Hayes, 1548 Market Street, inmate of a house of ill fame and vagrancy.

John Brown and Joseph McKay. Visitors to a house of ill fame—Police Court Dept. #1—Judge O'Brien.

22nd: Helen Hilton, 617 Ellis Street. Keeping a house of ill fame. Soliciting prostitution and vagrancy. Police Court Dept. #1—Judge O'Brien.

May Morris, Golden Gate Avenue and Hyde St., soliciting prostitution and vagrancy. Police Court Dept. #1—Judge O'Brien.

22nd: Harold Cabot, 1051 Post Street. Violating the State Prohibition Act. (Sale and possession.) Police Court Dept. #2—Judge Lazarus. [412]

Alfred Bishop, 1724 Fillmore Street, keeping a gambling place. Claude Berton, Jack Allen, Herman Offenbach, Robert Zemon, Harold Sydelman, Harry Goldman, George Bates, Ed. Miller, William Perry, Raymond Meehan, Frank White, Joseph Brown, Arthur Hyatt, Frank Deliss, Harvey Burton, Andrew J. Whitman and Antone Sanders, visitors to a gambling place. Police Court Dept. #2—Judge Lazarus.

23rd: Ethel Davis, 602 Golden Gate Avenue, keeping a house of ill fame. Soliciting prostitution and vagrancy. Police Court Dept. #1—Judge O'Brien.

Ethel Weldon, 1708 Webster Street. Keeping a house of ill fame. Soliciting prostitution and vagrancy. Police Court Dept. #1—Judge O'Brien.

24th: Margaret Norton, 1548 Market Street, keeping a house of ill fame, soliciting prostitu-

tion and vagrancy. Police Court Dept. #1—Judge O'Brien.

24th: Marie Devon, 381 Turk Street. Keeping a house of ill fame, soliciting prostitution and vagrancy. Police Court Dept. #1—Judge O'Brien.

25th: Jacqueline Brown (Colored) Geary and Webster Streets, soliciting prostitution and vagrancy. Continued from Sept. 18th, 1924. Police Court Dept. #1—Judge O'Brien.

25th: Ethel Waldon, 1708 Webster Street, keeping a house of ill fame, soliciting prostitution and vagrancy. Police Court Dept. #1—Judge O'Brien.

26th: Frances Lee, Ellis and Webster Streets, soliciting prostitution and vagrancy. Police Court Dept. #1—Judge O'Brien.

27th: Helen Williams, 802a McAllister Street. Keeping a house of ill fame, soliciting prostitution and vagrancy. Police Court Dept. #1—Judge O'Brien.

27th: Andree Miller, 1764 Geary Street. Keeping a house of ill fame, soliciting prostitution and vagrancy. Rudolph Durant, visitor to a house of ill fame. Police Court Dept. #1—Judge O'Brien.

29th: Eva Stewart, 525 Leavenworth Street. Soliciting prostitution and vagrancy. Herman King, visiting a house of ill fame. Police Court Dept. #1—Judge O'Brien.

29th: Henry Shimiza, Phillip Moore and D. Ispirito, 1623 Buchannan Street, keepers of a gambling place. Tifoles Gonzales, Jimmie Inajaki, Peter Miner, Tom Yama, M. Cortez, Yama Nihi, Exlogio Ramez, Charles Wong, Frank Chan, Sam Toda, Yosiho Yoshido, Henry Maria, Frank Toda, M. Igachi, H. Haya, Pon Ciano, Romelo Castro, Frank Rapado and I. Mori, Bill Lomioc, Pedro Lopez, D. Shimiza, Ed. Agawin, N. Bon, visitors to a gambling place. Police Court Dept. #4—Judge Jacks. [413]

29th: Thomas Gillen and Harry Levos, *alias* Henry Lewis, 1137 Fillmore Street, violating State Poison Law. Rebooked and tried on September 30th, 1924. Police Court Dept. #4—Judge Jacks.

Last two cases on September 29th, 1924, continued to September 30th, 1924, upon which last-mentioned date they were disposed of.

On said Sundays, to wit, September 21st and September 28th, 1924, I did not report to the Bush Street Police Station, the station to which I was in said month of September, assigned, until about 2 P. M. of said days.

I reside at 1132 Masonic Avenue, in the city and county of San Francisco, State of California, and on said Sundays remained in my house all morning until about 12 M. of said Sundays, whereupon I attended religious services and after said religious services, returned to my home, remained there for

a brief period and then went to said Police Station, arriving there as aforesaid at about 2 P. M.

Said Latham was the last witness called in this case and called by the Government in rebuttal. I was taken by surprise at the testimony given by him in alleged rebuttal and the evidence of the cases I have hereinbefore set forth and my connection therewith, is material to me, and I could not with reasonable diligence have discovered it and produced it at the trial, because of the manner in which and the time at which Latham testified and the subject matter to which he testified. Said Latham did not fix the date in September, 1924, when he claims to have seen me at said 1249 Polk Street, any more definitely than to say that it was in the latter part of September, and for this additional reason, said evidence of my movements as hereinbefore set forth during the whole month of [414] September, 1924, was and is material to me.

JOSEPH GORHAM.

Subscribed and sworn to before me this 19th day of January, 1925.

[Seal] R. H. JONES,

Notary Public in and for the City and County of San Francisco, State of California.

Said motion for a new trial was thereupon submitted to the Court for its decision, and after due consideration, the Court denied the motion for a new trial, to which ruling the attorney for the defendant Gorham then and there duly excepted.

Thereupon and at the same time the attorney for

the defendant Gorham presented to the Court a motion in arrest of judgment, which motion was and is in the words and figures following, to wit:

In the Southern Division of the District Court of the United States for the Northern District of California, First Division.

No. 15,708.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH GORHAM et al.,

Defendants.

MOTION IN ARREST OF JUDGMENT.

Now comes defendant Joseph Gorham in the above-entitled action, and against whom a verdict of guilty was rendered on the 14th day of January, 1925, on the indictment herein, and moves the Court to arrest the judgment against said defendant and hold for naught the verdict of guilty rendered against him for the following reasons:

1. That said indictment does not charge any offense against the laws of the United States, nor does it charge [415] said defendant with the doing of anything, the doing of which is prohibited by the laws of the United States.

2. That the said indictment does not state facts sufficient to constitute an offense against the laws of the United States.

3. That said indictment does not set forth facts sufficient in law to support the evidence.

4. That the defendants in said cause entered into a conspiracy to do the acts charged to have been done by them, is a conclusion of law and does not state any cause or offense against the laws of the United States.

5. That allegation "7" in said indictment:

> "That in pursuance of said conspiracy, combination, confederation and agreement herein in this indictment set out, and to effect and accomplish the objects thereof, and with the intent and for the purpose of effecting and accomplishing the objects thereof, the said defendant Joseph Gorham, then and there being a duly and regularly qualified, appointed and acting police officer of the Police Force in the City and County of San Francisco, California, did on or about the 31st day of March, 1924, at 1249 Polk Street, in the City and County of San Francisco, in the Southern Division for the Northern District of California, within the jurisdiction of this Court, receive as such Police Officer from said defendant George Birdsall, *alias* George Howard, *as such police officer from said defendant, George Birdsall, alias George Howard,* the sum of $90.00, lawful money of the United States.
>
> Against the peace and dignity of the United States of America and contrary to the form of the statute of the United States of America in such cases provided."

(a) That there is no statute of the United States of America preventing a police officer or police sergeant of the city and county of San Francisco from receiving money from any person.

(b) That it is no crime, nor is it forbidden by the laws of the State of California, for a police officer, or a police sergeant of the city and county of San Francisco, to [416] receive money from any person.

(c) That said paragraph setting forth said alleged overt act does not state that said sum of $90.00 was received by said Joseph Gorham as such police officer or sergeant, for any unlawful purpose.

(d) That said paragraph does not state that said Joseph Gorham received said sum of $90.00 for the purpose of permitting the other defendants or any or either of them charged in said indictment, to violate any law or laws of the United States.

WHEREFORE, this defendant prays that this motion be sustained and that judgment of conviction against him be arrested and held for naught and that he have all such further orders as may be just and proper in the premises.

WILLIAM A. KELLY,
Attorney for Defendant Joseph Gorham.

Said motion in arrest of judgment was thereupon submitted to the Court for its decision, and after due consideration, the Court denied the motion in arrest of judgment, to which ruling the attorney for the defendant Gorham then and there duly and regularly excepted.

Thereupon, and at said time, the attorney for defendant Patrick Kissane presented to the Court a motion for a new trial on behalf of the defendant Patrick Kissane, which said motion for a new trial was and is in the following words and figures, to wit: [417]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 15,708—CR.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PATRICK KISSANE et al.,

Defendants.

MOTION FOR A NEW TRIAL (PATRICK KISSANE).

Now comes Patrick Kissane, one of the defendants in the above-entitled cause, and by Jos. L. Taaffe, Esq., his attorney, moves the Court to set aside the verdict rendered herein and to grant a new trial of said cause and for reasons therefor, shows to the Court the following:

I.

That the verdict in said cause is contrary to law.

II.

That the verdict in said cause was not supported by the evidence in the case.

III.

That the evidence is said cause is insufficient to justify said verdict.

IV.

That the Court erred upon the trial of said cause in deciding questions of law arising during the course of the trial, which errors were duly excepted to.

V.

That the Court improperly instructed the Jury to the defendant's prejudice.

Dated at San Francisco California, this 6th day of January, 1925.

PATRICK KISSANE,
Defendant.
JOS. L. TAAFFE,
Attorney for Defendant. [418]

Said motion for a new trial was thereupon submitted to the Court for its decision, and after due consideration, the Court denied the motion for a new trial, to which ruling the attorney for the defendant Kissane then and there duly and regularly excepted.

Thereupon, and at the same time, the attorney for the defendant Patrick Kissane presented to the Court a motion in arrest of judgment, which motion was and is in the words and figures following, to wit:

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 15,708.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PATRICK KISSANE et al.,

Defendants.

MOTION IN ARREST OF JUDGMENT.

Now comes the defendant, Patrick Kissane, and respectfully moves this Court to arrest and withhold judgment in the above-entitled cause and that the verdict of conviction of said defendant, Patrick Kissane, heretofore given and made in said cause be vacated and set aside and declared to be null and void for each of the following causes and reasons:

I.

That the facts stated in the indictment on file herein upon which said conviction was and is based and upon which judgment was pronounced do not constitute a crime or public offense within the jurisdiction of this Court. [419]

II.

That said indictment does not state facts sufficient to charge the defendant Kissane with any crime or offense against the United States or against any statute or law thereof.

III.

That said indictment does not state facts sufficient to charge the defendant Kissane with having conspired with the defendants named in said indictment or each or either of them to commit any crime or offense against the United States or any law or statute thereof.

IV.

That the allegations in said indictment that the defendants in said cause entered into a conspiracy to do the acts therein charged to have been done by them is merely a conclusion of law and does not state any crime or offense against the United States or any law or statute thereof.

V.

That allegation 7 of said indictment, to wit:

> "That in pursuance of said conspiracy, combination, confederation and agreement herein in this indictment set out and to effect and accomplish the objects thereof, and with the intent and for the purpose of effecting and accomplishing the objects thereof, the said defendant, Patrick Kissane, then and there being a duly and regularly qualified appointed and acting police officer of the police force of the City and County of San Francisco, California, did on or about the 17th day of November, 1923, at 1249 Polk Street in the City and County of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this Court, receive as such police officer from said defendant

George Birdsall, *alias* George Howard the sum of Five ($5.00) Dollars lawful money of the United States of America.

"Against the peace and dignity of the United States of America and contrary to the form of the statute of the said United States of America in such case made and [420] provided,"

is insufficient to charge an overt act in furtherance of said conspiracy etc.; for the following reasons:

a. That there is no statute of the United States of America which forbids or prohibits a person receiving money as a police officer.

b. That it is no crime nor is it forbidden by the laws of the State of California for a person to receive money as a police officer.

c. That said paragraph 7 setting forth said alleged overt act does not state that the said sum of Five Dollars was received by said Patrick Kissane as such police officer for any unlawful purpose.

d. That said paragraph 7 does not state that said Patrick Kissane received said sum of Five Dollars for the purpose of permitting the other defendants or any or either of them charged in said indictment, to violate any law or laws of the United States.

VI.

That this Honorable Court has no jurisdiction to pass judgment upon the defendant, Patrick Kissane, by reason of the fact that the said indictment fails to charge said defendant with any

crime against the United States, but on the contrary the said indictment shows affirmatively that the matters and things which the said Kissane is alleged to have done in connection with the other defendants or any or either of them are not unlawful or criminal, or in violation of any penal statute of the United States and more particularly for the reasons hereinbefore set forth in paragraph one of this motion. [421]

WHEREFORE, by reason of the premises the said defendant Patrick Kissane prays this Honorable Court that judgment herein be arrested and withheld and that conviction of said defendant, Patrick Kissane, be declared null and void.

JOS. L. TAAFFE,
Attorney for Defendant.

Said motion in arrest of judgment was thereupon submitted to the Court for its decision, and after due consideration, the Court denied the motion in arrest of judgment, to which ruling the attorney for the defendant Patrick Kissane then and there duly and regularly excepted.

Thereupon, and at said time, the attorneys for Joseph E. Marron and George Birdsall, defendants, presented to the Court a motion for a new trial on behalf of the defendants Joseph E. Marron and George Birdsall; which said motion was and is as follows, to wit:

In the District Court of the United States for the Northern District of California, First Division.

No. 15,708.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE HAWKINS et al.,

Defendants.

MOTION FOR A NEW TRIAL FOR DEFENDANTS JOSEPH E. MARRON, *alias* EDDIE MARRON, and GEORGE BIRDSALL, *alias* GEORGE HOWARD.

Now come the defendants Joseph E. Marron and George Birdsall and move the Court that the verdict herein rendered be vacated and a new trial heard for the following reasons: [422]

1. That the verdict is contrary to the evidence.

2. That the verdict is contrary to the weight of the evidence.

3. That the verdict is contrary to the law as given to the jury by the Court.

4. That the Court erred in refusing defendants Joseph E. Marron and George Birdsall special instructions Nos. 1, 3, 12, 16, 17, 18, 23, 24, 26, 27, 30, 31 and 36.

5. That the Court erred insomuch of its general charge as it left to the jury to determine whether or not the defendants here or either, or any

of them, were the parties to the, or any, conspiracy as charged in the indictment.

6. That the Court erred in admitting evidence contrary to law.

7. That new and material facts have come to light since the trial.

8. That other errors at law appeared upon the trial, prejudicial to defendants.

9. That errors at law occurred during the trial of the case in admitting evidence prior to June, 1923, and subsequent to October 3, 1924, which were duly excepted to by the defendants.

10. Errors of law occurring at the trial and excepted to by the defendants.

11. Further, on the ground of newly discovered evidence.

HUGH L. SMITH,
CHAS. J. WISEMAN,
Attorneys for Defendants Joseph E. Marron and George Birdsall. [423]

Said motion for a new trial was thereupon submitted to the Court for its decision, and after due consideration, the Court denied the motion for a new trial, to which ruling attorneys for the defendants Joseph E. Marron and George Birdsall then and there duly and regularly excepted.

Thereupon and at the same time the attorneys for the defendants Joseph E. Marron and George Birdsall presented to the Court a motion in arrest of judgment, which motion was and is as follows, to wit:

In the District Court of the United States for the Northern District of California, First Division.

No. 15,708.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE HAWKINS et al.,

Defendants.

MOTION IN ARREST OF JUDGMENT.

Now come the defendants Joseph E. Marron and George Birdsall in the above-entitled action and against whom a verdict of guilty was rendered on the 14th day of January, 1925, on the indictment filed herein, and move the Court to arrest the judgment against said defendants on said indictment and hold for naught the verdict of guilty rendered against them for the following reasons:

1. That said indictment does not charge any offense against the laws of the United States nor does it charge said defendants with the doing of anything, the doing of which is forbidden by the laws of the United States.

2. That said indictment does not set forth any facts sufficient in law to constitute a conviction.

3. That there is no fact or circumstance stated therein to advise the Court that an offense has been [424] committed against the United States.

4. That evidence against these defendants has

been received on matters pertaining to former jeopardy, which said jeopardy had already attached as to each of them.

5. That said indictment fails to set forth every element of the offense intended to be charged.

6. That it does not set forth any facts sufficient in law to support a conviction.

7. That these defendants have been convicted without the process of law, and in violation of Articles IV, V and VI of Amendments to the Constitution of the United States.

WHEREFORE, these defendants pray that this motion be sustained and the judgment of conviction against them be arrested and held for naught, and that they have all such other orders as may be just and proper in the premises.

HUGH L. SMITH,
CHAS. J. WISEMAN,
Attorneys for Defendants Joseph E. Marron and George Birdsall.

That said motion in arrest of judgment was thereupon submitted to the Court for its decision, and after due consideration the Court denied the motion in arrest of judgment, to which ruling the attorneys for the defendants Joseph E. Marron and George Birdsall then and there duly and regularly excepted.

The Court having denied the motions for a new trial and the motions in arrest of judgment as to said defendants, thereupon the Court rendered its judgment:

That whereas, the said Joseph E. Marron, George

Birdsall, Charles Mahoney, Patrick Kissane and Joseph [425] Gorham having been duly convicted in this Court for the crime of conspiracy;

IT IS THEREFORE ORDERED AND ADJUDGED that said defendant Marron be imprisoned for two years in the penitentiary, and a fine of ten thousand dollars; the defendant Birdsall to thirteen months in the penitentiary, and a fine of one thousand dollars; the defendant Mahoney, a fine of five hundred dollars; the defendant Kissane, two years in the penitentiary and a fine of one thousand dollars; the defendant Gorham two years in the penitentiary and a fine of two thousand five hundred dollars.

Judgment entered this —— day of January, 1925.

WALTER B. MALING,
Clerk.

By ————————,
Deputy Clerk.

[Endorsed]: No. 15708. Hawkins et al. Jan. ——, 1925. Entered in Vol. ——, Judgment and Decrees, at page ——.

The above bill of exceptions contains all the evidence, oral and documentary, and all of the proceedings relating to the trial, judgment and conviction and sentence, motion for a new trial and motion in arrest of judgment of the defendants, and each of them.

WHEREFORE, in order that all the proceedings had upon the trial of the above-entitled cause may be preserved, the defendants herein propose the

foregoing as a full and correct bill of exceptions of all the proceedings had and of all the evidence adduced at the trial by both the plaintiff and [426] the defendants, and pray that the same may be settled and allowed as a bill of exceptions of such proceedings, to be used on appeal from the judgment herein.

Dated: January 2d, 1925.

CHAS. J. WISEMAN,
HUGH L. SMITH,
Attorneys for Joseph E. Marron and George Birdsall.

JOS. L. TAAFFE,
Attorney for Patrick Kissane,
WILLIAM A. KELLY,
Attorney for Joseph Gorham. [427]

In the District Court of the United States for the Northern District of California, First Division.

No. 15,708.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE HAWKINS et al.,

Defendants.

STIPULATION RE BILL OF EXCEPTIONS.

It is hereby stipulated and agreed by and between the attorneys for the United States and the attorneys for the defendants that all exhibits in-

troduced in evidence and for identification upon the trial of the above-entitled cause, and now in the custody of the Clerk of the court, shall be deemed to be included as a part of the foregoing bill of exceptions, with the same effect in all respects as if incorporated in said bill of exceptions. In the event the said exhibits are not so numbered as to identify the same, they shall be marked by the Court upon its certification of this bill of exceptions so as to identify the same.

It is further hereby stipulated and agreed that this bill of exceptions may be used as the bill of exceptions for the writ of error sued out separately by the defendant Joseph E. Marron, and the writ of error sued out separately by the defendant George Birdsall, and the writ of error sued out separately by the defendant Patrick Kissane, and the [428] writ of error sued out separately by the defendant Joseph Gorham.

Dated February 3, 1925.

STERLING CARR,
United States Attorney.
KENNETH C. GILLIS,
Asst. U. S. Attorney.
Attorneys for the United States.
CHAS. J. WISEMAN,
HUGH L. SMITH,
Attorneys for Joseph E. Marron and George Birdsall.
JOS. L. TAAFFE,
Attorney for Patrick Kissane,
WILLIAM A. KELLY,
Attorney for Joseph Gorham.

It is hereby stipulated and agreed by and between the attorneys for the United States and the attorneys for the respective defendants that the proposed bill of exceptions of said defendants on said writs of error sued out separately by each defendant, and the proposed amendments of the United States to said bill of exceptions, have been correctly engrossed and have been presented in time and, as engrossed, may be approved, allowed and settled by the Judge of the above-entitled court as correct in all respects; and that the same shall be made a part of the record in said case and shall be and is the bill of [429] exceptions upon the writs of error sued out seprately by each of the defendants herein.

Dated February 3, 1925.

STERLING CARR,
United States Attorney
KENNETH C. GILLIS,
Asst. U. S. Attorney,
Attorneys for the United States.
CHAS. J. WISEMAN,
HUGH L. SMITH,
Attorneys for Joseph E. Marron and George Birdsall.
JOS. L. TAAFFE,
Attorney for Patrick Kissane.
WILLIAM A. KELLY,
Attorney for Joseph Gorham.

ORDER APPROVING AND SETTLING BILL OF EXCEPTIONS.

The foregoing bill of exceptions, duly proposed and agreed upon by the counsel for the respective parties, is correct in all respects and is hereby approved, allowed and settled and made a part of the record herein, as per stipulation of the attorneys for the respective parties.

Dated February 5, 1925.

JOHN S. PARTRIDGE,
U. S. District Judge.

[Endorsed]: Filed Feb. 5, 1925. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [430]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

Number 15,708—CRIMINAL.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

PATRICK KISSANE et al.,
Defendants.

PETITION FOR WRIT OF ERROR AND SUPERSEDEAS (PATRICK KISSANE).

Now comes Patrick Kissane, one of the defendants in the above-entitled court, by Jos. L. Taaffe,

Esq., his attorney, and says that on the 14th day of January, 1923, this Court rendered judgment and sentence against said defendant whereby he was adjudged and sentenced to imprisonment and to be fined, to wit: To be imprisoned for a term of two years in the Federal Penitentiary at Fort Leavenworth, State of Kansas, and to pay a fine in the sum of One Thousand Dollars ($1000) in United States gold coin; that in the judgment and proceedings had prior thereto in this cause certain errors were permitted to the prejudice of the said defendant Kissane, all of which will more fully appear from the assignment of errors which is filed with this petition.

WHEREFORE, the said defendant Patrick Kissane prays that a writ of error may issue in his behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of errors complained of, and that a transcript of the record in this cause duly authenticated may be sent to said Circuit Court of Appeals, and that the defendant Patrick Kissane be awarded a supersedeas upon said judgment and all and necessary and [431] proper process, including bail.

PATRICK KISSANE,
Defendant and Petitioner.
JOS. L. TAAFFE,
Attorney for Petitioner and Defendant.

Due service of the within petition for writ of error and supersedeas is hereby admitted, this 20 day of January, 1925.

STERLING CARR,
United States Attorney.
By T. J. SHERIDAN,
Asst. Attorney for the United States.

[Endorsed]: Filed Jan. 20, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [432]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 15,708.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PATRICK KISSANE et al.,

Defendants.

ASSIGNMENT OF ERRORS (PATRICK KISSANE).

Patrick Kissane, one of the defendants in the above-entitled action, and plaintiff in error herein, having petitioned the Court for an order from said Court permitting him to procure a writ of error to this Court, directed from the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment and sentence entered herein in said cause

against said Patrick Kissane, now makes and files with his said petition the following assignment of errors herein upon which he will apply for a reversal of said judgment and sentence upon the said writ, and which said errors, and each of them, are to the great detriment, injury and prejudice of the said defendant and in violation of the rights conferred upon him by law, and he says that in the record and proceedings of the above-entitled cause, upon the hearing and determination thereof in the Southern Division of the District Court of the United States for the Northern District of California, there is manifest error in this to wit:

I.

The Court erred in pronouncing sentence and rendering judgment upon conviction under an indictment which was fatally [433] defective and which was called to the Court's attention in defendant's motion in arrest of judgment, which set forth the following deficiencies, to wit:

It appears upon the face of the record that no judgment can be legally entered against the defendant Kissane, for:

(1) The facts stated in the indictment on file herein and upon which said conviction was and is based and upon which judgment was pronounced do not constitute a crime of public offense within the jurisdiction of this Court.

(2) That said indictment does not state facts sufficient to charge the defendant Kissane with any crime or offense against the United States or against any statute thereof.

(3) That said indictment does not state facts sufficient to charge the defendant Kissane with having conspired with the defendants named in the said indictment, or each or either of them, to commit any crime or offense against the United States.

(4) That the allegation in said indictment that the defendants in said cause entered into a conspiracy to do the acts therein charged to have been done by them is merely a conclusion of law and does not state any crime or offense against the United States.

(5) That allegation 7 of said indictment, to wit:

> "That in pursuance of said conspiracy, combination, confederation and agreement herein in this indictment set out and to effect and accomplish the objects thereof, and with the intent and for the purpose of effecting and accomplishing the objects thereof, the said defendant, Patrick Kissane, then and there being a duly and regularly qualified, appointed and acting police officer of the police force of the City and County of San Francisco, California, did on or about the 17th day of November, 1923, at 1249 Polk Street, in the City and County of [434] San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this Court, receved as such police officer from said defendant, George Birdsall, alias George Howard, the sum of Five ($5.00) Dollars, lawful money of the United States of America."

"Against the peace and dignity of the United States of America and contrary to the form of the statute of the said United States of America in such case made and provided."

is insufficient to charge an overt act in furtherance of said conspiracy, etc., for the following reasons:

a. That there is no statute of the United States of America which forbids or prohibits a person receiving money as a police officer.

b. That it is no crime nor is it forbidden by the laws of the State of California for a person to receive money as a police officer.

c. That said paragraph setting forth said alleged overt act does not state that the said sum of five dollars was received by said Patrick Kissane as such police officer for any unlawful purpose.

d. That said paragraph does not state that said Patrick Kissane received said sum of five dollars for the purpose of permitting the other defendants or any or either of them charged in said indictment to violate any law or laws of the United States.

II.

That this Honorable Court has no jurisdiction to pass judgment upon the defendant, Patrick Kissane, by reason of the fact that the said indictment fails to charge said defendant with any crime against the United States, but, on the contrary, the said indictment shows affirmatively that the matters and things which the said Kissane is alleged to have done in [435] connection with the other defendants or any or either of them are not unlawful or criminal, or in violation of any penal

statute of the United States and more particularly for the reasons hereinbefore set forth in paragraph one of this motion.

To the Court's ruling denying defendant and plaintiff in error Kissane's motion in arrest of judgment, said defendant duly excepted. This question is reviewable as well under rule II of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit.

SECOND.

The Court erred in admitting in evidence the following testimony over the objection of counsel for the defendant, Patrick Kissane, made upon the ground that in so far as that defendant was concerned the testimony was immaterial, irrelevant and incompetent; that no proper foundation had been laid for it; that no attempt had been made at all by the Government witnesses to connect the defendant Kissane with the book in any manner whatsoever. The Court overruled said objection, to which ruling the defendant, Patrick Kissane, duly excepted. The Court also erred upon this same subject when at the conclusion of the testimony to be hereinafter set out counsel for the defendant, Patrick Kissane, moved to strike out all of the evidence, which had been introduced in reference to the book mentioned herein, in so far as it might affect the rights of defendant, Patrick Kissane, upon the ground that the testimony had been shown to be immaterial, irrelevant and incompetent; and in so far as the defendant Kissane was concerned it was purely hearsay and that no foun-

dation had been laid for it. The Court denied said motion to which order denying same, the defendant Kissane then and there duly excepted. That the testimony, relating to this subject, defendant's objections, the Court's ruling and the defendant Kissane's exceptions were as follows: [436]

TESTIMONY OF W. F. WHITTIER, CALLED FOR THE GOVERNMENT.

Mr. GILLIS.—I will show you a book, Mr. Whittier, and ask you to look at it. Do not make any statements in reference to it until after you have looked at it.

WITNESS.—That is the book.

Mr. GILLIS.—When did you first see this book?

A. When we went in Agent Howard and I went into where we found the champagne in the closet in the front room.

Q. It was on October 2, 1924? A. Yes.

Q. At 1249 Polk Street? A. Yes.

Q. Where did you find this book?

A. In those premises. In that closet there is a wash-stand and this book was on the wash-stand under the cigar-box with a lot of currency in it.

Q. Was the closet locked?

A. Yes, the closet was locked.

Q. Was there anything else in the closet or on the floor of the closet?

A. Just the cigar-box that was full of currency and the champagne that was in the trap in the floor.

Q. This was off one of the rooms was it?

A. It was in one of the rooms, the front room.

Mr. GILLIS.—I offer this book in evidence and ask that it be marked U. S. Exhibit 3.

Mr. TAAFFE.—In so far as the defendant Kissane is concerned, we will interpose the objection at this time that it is immaterial, irrelevant and incompetent and no proper foundation has been laid and furthermore that there has been no attempt at all made by the Government witness to connect Kissane with this book in any manner [437] whatsoever.

The COURT.—Overruled.

Mr. TAAFFE.—Exception.

Mr. GILLIS.—(Reading to the jury.) I will call your attention, Gentlemen, to a few of the things in this book; I will call your attention to page 34, an item in the center of the page after 17/23, which is marked "gift Kissane" and above the word Kissane is written the word police. Then on page 51 we have the word in the center of the page police $100.00 and the word Kissane $5.00. On page 60 we have Kissane on the 10th, $5.00. On page 68 for March we again have on March 23, Kissane $5.00; 9th, Kissane $5.00, and on the 16th, $5.00, on the 23d, $5.00, and on the 30th, Kissane $5.00. On page 74 for the month of April we have on the 6th, Kissane $5.00; on the 13th, marked gift $5.00; on the 20th, gift $5.00; on the 27th, Kissane $5.00; on page 80 for the month of May we have on the 4th, $5.00; on the 11th, $5.00; on the 25th, $5.00 and on the 17th, Kissane $5.00. Then on page 36 for the month of June we have, on June 1, Kissane $5.00; on the 8th, Kissane $5.00; on the

15th, Kissane $5.00 and on the 22d, police $15.00. On page 92 for July we have, on the 6th, Kissane $5.00; on the 13th, $5.00; on the 20th, Kissane $5.00; on the 27th, Kissane $5.00. On page 98 for the month of August we have on the 3d, Kissane $5.00; on the 10th, Kissane $5.00; on the 16th, Kissane $5.00 and on the 24th, Kissane $15.00. On page 104 for the month of September, we have on the 21st, Kissane $15.00; on the 28th, Kissane $5.00. Now, I call your attention to page 69 and an item marked on page 69 towards the bottom of the page, gift $60.00, and underneath as a matter of fact the last item, this is for March, 1924, new police. On page 74 we have gift $90.00 on the 16th, and on the 27th we have gift $60.00. On page 80 we have police on the 22d, $90.00, and on the 26th, police $60.00. On page 86 we have the 14th of [438] June, police $150.00. On page 92 we have gift $150.00 and on page 98 we have gift police $150.00, that is August 11. On page 104, September 15, we have gift $150.00.

Mr. TAAFFE.—I make a motion at this time to strike out all of the evidence that has been introduced with reference to the book in so far as it might affect the rights of defendant Kissane upon the grounds that it is immaterial, irrelevant and incompetent and in so far as he is concerned it is purely hearsay and the proper foundation has not been laid for it.

The COURT.—Motion denied.

Mr. TAAFFE.—Note an exception.

THIRD.

The Court erred in admitting in evidence over the objection of the defendant, Patrick Kissane, a certain book containing a number of items with the name "Kissane" in it, which was not shown at the time or any time subsequent to be the defendant, Patrick Kissane. The objection was made upon the ground that it was incompetent, irrelevant and immaterial; that no foundation has been laid for it and no attempt had been made at all by the Government witnesses to connect the defendant, Patrick Kissane, with it. The Court overruled the objection of the defendant, Patrick Kissane, and admitted the book in evidence. To the Court's order and ruling defendant, Patrick Kissane, duly excepted. The testimony concerning same is set out in full under the second assignment of error, hereinabove set forth and is made a part hereof.

FOURTH.

The Court erred in denying the motion of the defendant, Patrick Kissane, to strike out the evidence which had been introduced by reading from a book, named in the proceedings as Government's Exhibit Number 3, entries with the name Kissane. The motion was made upon the ground that in so far as it affected [439] the rights of the defendant, Patrick Kissane, it was immaterial, irrelevant and incompetent. As far as he was concerned it was purely hearsay and the proper foundation had not been laid for it. To the Court's order denying the defendant Kissane's motion to strike out said

testimony, defendant, Patrick Kissane, duly excepted. The testimony concerning this point is set out in full under the second assignment of error herein and is made a part hereof.

FIFTH.

The Court erred in submitting to the jury for its deliberation and verdict the charge contained in the indictment against the defendant, Patrick Kissane, for the following reasons: First, there was no conspiracy proven. Second, that the evidence was insufficient to connect the defendant, Patrick Kissane, with any conspiracy to violate any of the provisions of the National Prohibition Act or the regulations of the Commissioner of Internal Revenue or any modifications thereof. Third, that the indictment upon which the defendant, Patrick Kissane, was accused and tried did not state any public offense against the laws of the United States. Fourth, that the evidence adduced before the Court was insufficient to prove that the defendant, Patrick Kissane, ever maintained a common nuisance in keeping for sale and selling any intoxicating liquors for beverage purposes or otherwise at any of the places mentioned and set forth in the said indictment. And the evidence is insufficient to show that he aided or abetted or conspired or confederated or agreed with the other defendants or any or either of them or any person or persons in maintaining common nuisances in keeping for sale or selling intoxicating liquors for beverage purposes at the places set forth in the said indictment. Fifth, the evidence was insufficient to convict the

defendant, Patrick Kissane, of selling intoxicating liquor to any person whatsoever at any time, place or at all or that he aided or abetted or conspired or confederated or agreed with the other defendants mentioned in the indictment or with any or either of them or with any person or persons whatsoever in the sale of intoxicating liquors at the places [440] and times mentioned in the indictment or at all. Sixth, the evidence was insufficient to convict the defendant, Patrick Kissane, of the possession, manufacture, transportation or any other offense under the National Prohibition Act, or the Regulations of the Commissioner of Internal Revenue or any modifications thereof, or that he aided or abetted or conspired or confederated or agreed with the other defendants mentioned in the indictment or with any or either of them or with any person or persons whatsoever in the possession, transportation, manufacture of intoxicating liquors at the places or times mentioned in the said indictment or at all; or that he aided or abetted or conspired or confederated or agreed with any of the persons mentioned in the indictment or with any person whatsoever for any other violation of the National Prohibition Act or the rules of the Commissioner of Internal Revenue or any modifications thereof. Seventh, that the evidence was insufficient to prove that the defendant, Patrick Kissane, is or was the same person referred to as Kissane in Government's Exhibit Number 3. Eight, that the evidence is insufficient to prove that the defendant, Patrick Kissane, is the same person

referred to as Kissane in any of the testimony adduced by the Government. Ninth, that the evidence was insufficient to prove that the defendant, Patrick Kissane, received, accepted or took five dollars or any other sum or sums of money from any person or persons mentined in the said indictment or from any other person or persons whatsoever at the places specified in said indictment or at any place or places whatsoever either on the date or dates mentioned in said indictment or at any other time either as a police officer or otherwise or at all.

The defendant, Patrick Kissane, at the conclusion of the Government's case and at the conclusion of the taking of testimony, moved the Court for a directed verdict of Not Guilty on account of the insufficiency of the evidence, which was [441] denied by the Court and to which the defendant, Patrick Kissane, duly excepted. The exception taken was comprehensive enough to protect this point, but if it were not, it is such a plain error that it comes within the purview of Rule 11 of the rules of the Circuit Court of Appeals for the Ninth Judicial Circuit.

SIXTH.

The Court erred in denying the motion of the defendant and plaintiff in error, Patrick Kissane, for a directed verdict of Not Guilty made at the conclusion of the Government's case, upon the ground that the Government had not offered sufficient evidence to convict him of the charge set forth in the indictment.

To the Court's ruling denying said motion the defendant and plaintiff in error, Patrick Kissane, duly excepted.

SEVENTH.

The Court erred in denying the motion of the defendant and plaintiff in error, Patrick Kissane, for a directed verdict of Not Guilty made at the conclusion of the taking of all of the testimony, upon the ground that the evidence was insufficient to convict him of the charge set forth in the indictment.

To the Court's ruling, denying said motion, the defendant and plaintiff in error, Patrick Kissane, duly excepted.

EIGHTH.

The Court erred in denying the motion of the defendant and plaintiff in error, Patrick Kissane, made at the conclusion of the taking of all the testimony, to exclude all of the testimony with regard to the defendant, Patrick Kissane, because he had not been connected in any manner whatsoever with the alleged offenses set forth in the indictment.

The Court's order denying said motion, defendant and plaintiff in error, Patrick Kissane, duly excepted. [442]

NINTH.

The Court erred in refusing to give the following instruction, which was presented to the Court by the defendant and plaintiff in error, Patrick Kissane, and requested by him in open court:

"You are further instructed that in considering the evidence introduced in order to determine whether or not a conspiracy was in existence between the defendants on trial herein, to violate the terms, conditions and provisions of the Volstead Act and whether or not the defendants Patrick Kissane and Joseph Gorham conspired with each other and with the other defendants on trial here to affect and consummate the objects of said conspiracy, you must disregard the evidence given with reference to the entries contained in the book marked 'Government's Exhibit in evidence number three' and give no consideration to the entries therein contained unless from the evidence introduced exclusive of the evidence contained in Exhibit Number Three you are convinced to a moral certainty and beyond a reasonable doubt that a conspiracy existed between all of the defendants to do the acts charged in said indictment."

To the Court's refusal to give such instruction defendant and plaintiff in error, Patrick Kissane, duly excepted.

TENTH.

The Court erred in refusing to give the following instructions requested by said defendant and plaintiff in error, Patrick Kissane.

"The defendant Patrick Kissane is a peace officer, and as to public offenses of the degree of misdemeanors he has no authority to make arrests, unless armed with a warrant save and

except in those cases where the offense is committed in his presence."

To the Court's refusal to give such instruction, said defendant and plaintiff in error, Patrick Kissane, duly excepted. [443]

ELEVENTH.

The Court erred in refusing to give the following instruction requested by the defendant and plaintiff in error, Patrick Kissane.

"While common repute may be received as competent evidence of the character of the premises conducted at 1249 Polk Street, San Francisco, California, the failure of Patrick Kissane to act upon such common repute in arresting the proprietor or visitors thereof does not constitute a neglect of his official duty."

To the Court's refusal to give such instruction said defendant and plaintiff in error, Patrick Kissane, duly excepted.

TWELVE.

The Court erred in giving the following instruction or comment over the objection of the defendant and plaintiff in error, Patrick Kissane, to which instruction the said defendant and plaintiff in error, Patrick Kissane, duly excepted, in open court after calling the Court's attention to same.

"Now that statute passed by the State of California to say nothing of the Statute of the United States places or imposes the duty upon every peace officer to use his best endeavors to enforce that law, like every other law, and,

where he finds that persons are transgressing it to see that they are arrested and prosecuted in accordance wih that Statute and the Statute of our Congress. In considering therefore the case of these two police officers, you must, of course, as I know enough about you to know that you will, eliminate from your minds, either for or against your personal opinions with regard to whether or not it ought to be the law, and start out with the proposition that it was the duty of this sergeant and patrolman, who are before you, to enforce that law, and to investigate and arrest, if they found any person transgressing it. I do not mean that you are to keep [444] this distinction in mind that any man can be found guilty of conspiracy merely because he is an officer of the law and may have been merely careless or derelict in his duty; that might be a matter for investigating by the authorities of his own department, but it is a matter with which we have no concern; that is to say, mere negligence, or mere shutting of a man's eyes to a violation of the law would not constitute him a conspirator; . . . . Mere negligence or even shutting a man's eyes to a violation of the law would not constitute him a conspirator; but, if, on the other hand, he knew that the law was being violated and either by passive connivance or by actual agreement with the persons who were transgressing that law, he would be guilty of conspiracy with

them, whether he received any compensation or not. You are to determine, therefore, Gentlemen, from all the facts and circumstances of this case, whether or not these two police officers either actively or tacitly, even without a word being spoken, agreed with these other defendants, or any of them, to permit liquor to be sold at that place, or to be taken into it, or transported to it, or there possessed, or there possessed for the purpose of sale. If you find that there was such an agreement, tacit or otherwise, then these two defendants are guilty of conspiracy." . . . . "If you find that the entries in this book were kept in the regular course of business, however illegal and contrary to law that business may be, and you should find that the evidence warranted you in finding that there was any combination or agreement, tacit or otherwise for those two police officers to allow that place to run, then you are entitled to take into consideration all entries in that book to the effect that one of the expenses of that place was this money which is alleged to have been paid to Sergeant Gorham and Kissane. Of course, Gentlemen, no man is to be convicted of a crime because somebody writes his name in a book. But if you find three things— [445] first, that these entries of Kissane and Gorham were the Kissane and Gorham here on trial; secondly, that the book was kept in the regular course of business as

showing as a part of the expenses the payment of money to these officers; and third, if you find that there was any tacit, or other understanding that the place was to be run without police interference, then you may consider these entries as bearing upon the guilt or innocence of Gorham or Kissane or either of them."

THIRTEEN.

The Court erred in denying the motion for a new trial made on behalf of the defendant and plaintiff in error, Patrick Kissane. The grounds of said motion were as follows:

(1) That the verdict in said cause is contrary to law.

(2) That the verdict in said cause was not supported by the evidence in the case.

(3) That the evidence in said cause is insufficient to justify said verdict.

(4) That the Court erred upon the trial of said cause in deciding questions of law during the course of the trial arising during the course of the trial which errors were duly excepted to.

(5) That the Court improperly instructed the jury to defendant's prejudice.

To which ruling defendant and plaintiff in error, Patrick Kissane, duly excepted.

WHEREFORE, plaintiff in error, Patrick Kissane, prays that for the reasons contained herein,

the judgment and sentence rendered herein be reversed.

PATRICK KISSANE,
Defendant and Plaintiff in Error.

JOS. L. TAAFFE,
Attorney for Defendant and Plaintiff in Error.

Due service of the within assignment of errors is hereby admitted, this 20th day of January, 1925.

STERLING CARR,
Attorney for Pltf. [446]

[Endorsed]: Filed January 20, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [447]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

Number 15,708—CR.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

PATRICK KISSANE et al.,
Defendants.

ORDER ALLOWING WRIT OF ERROR AND SUPERSEDEAS (PATRICK KISSANE).

The writ of error and the supersedeas herein prayed for by Patrick Kissane, one of the defendants herein and plaintiff in error pending the

decision on said writ of error, is hereby allowed and the defendant, Patrick Kissane, is admitted to bail in the sum of Five Thousand ($5,000.00) Dollars.

The bond for costs of the writ of error on behalf of said defendant, Patrick Kissane, is hereby fixed at Two Hundred and Fifty ($250.00) Dollars.

Dated at San Francisco, California, this 20th day of January, 1925.

JOHN S. PARTRIDGE,
United States District Judge.

Due service of the within order allowing writ of error and supersedeas acknowledged and hereby admitted this 20 day of January, 1925.

STERLING CARR,
United States Attorney.

[Endorsed]: Filed Jan. 20, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [448]

In the Southern Division of the United States District Court for Northern District of California, First Division.

No. 15,708.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOSEPH GORHAM et al.,
Defendants.

PETITION FOR WRIT OF ERROR (JOSEPH GORHAM).

Now comes Joseph Gorham, one of the defendants in the above-entitled action, through his attorney, W. A. Kelly, Esq., and feeling aggrieved by the judgment of this court made and entered on the 14th day of January, 1925, wherein and whereby this defendant was sentenced to pay a certain money fine and to be imprisoned, as set forth in the judgment made and entered by the Court in said cause, to which judgment reference is hereby made for greater particularity, and your petitioner shows that he is advised by counsel and therefore that he avers that there was and is manifest error in the records and proceedings had in said cause and in the making, rendition and entry of said judgment and sentence to the great*y* injury and damage of your petitioner, all of which error will be more fully made to appear by an examination of said record, by examination of the bill of exceptions and assignment of errors filed herein and presented herewith.

And hereby petitions this Honorable Court for an allowance of a writ of error herein to the United States Circuit Court of Appeals in and for the Ninth Circuit, and that a full and complete transcript of the record and [449] proceedings in said cause be transmitted by the clerk of this Court to the Clerk of the United States Circuit Court of Appeals, in and for the Ninth Circuit, and that during the pendency of this writ of error,

all proceedings had in this court be suspended, stayed and superseded, and that during the pendency of said writ of error, the defendant, Joseph Gorham, be admitted to bail in such sum as to this Honorable Court seems meet and proper.

Dated: this 20th day of January, 1925.

WILLIAM A. KELLY,
Attorney for Joseph Gorham.

[Endorsed]: Filed Jan. 20, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [450]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 15,708.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOSEPH GORHAM et al.,
Defendants.

ASSIGNMENT OF ERRORS OF DEFENDANT JOSEPH GORHAM.

Now comes the defendant, Joseph Gorham, in the above-entitled action, and in connection with his petition for a writ of error herein makes the following assignment of errors, which he avers occurred upon the trial of said cause, to wit:

I.

That the Court erred in admitting in evidence that certain book marked on the trial of said cause as United States Exhibit No. 3 in evidence, upon the following grounds:

That it was immaterial, irrelevant and incompetent, hearsay as against defendant Gorham, nor proper foundation laid for its introduction against him, and that at the times of its introduction there was no evidence before the Court that Gorham conspired or confederated as charged in the indictment as hereafter more fully appears.

Mr. KELLY.—On behalf of the defendant Gorham, the book is objected to on the ground it is immaterial, irrelevant and incompetent, hearsay as against him, no foundation has been laid for the introduction of this [451] book in evidence against him, upon the ground that there is no evidence before this Court that he ever conspired or confederated in accordance with the allegations of the indictment.

The COURT.—Overruled.

Mr. KELLY.—Exception.

(Rep. Tr. Vol. —— p. 22.)

To which ruling of the Court said defendant Gorham then and there duly and regularly excepted.

II.

That the Court erred by its refusing to grant the motion of the defendant Gorham that the book, United States Exhibit No. 3, in evidence, and all the evidence and items mentioned therein be

stricken from the record as to the defendant Gorham, upon the following grounds:

That it was immaterial, incompetent, irrelevant and hearsay as to the defendant Gorham; that no proper foundation had been laid for its introduction, and that no evidence had been adduced in any way connecting him with the conspiracy charged, as more fully appears below.

Mr. KELLY.—Your Honor will note that I objected primarily to the introduction of this book in evidence on the ground that it was immaterial, irrelevant and incompetent, as against the defendant Gorham, that it was hearsay, and not binding upon him, and there was no proper foundation laid, in that there had been no evidence showing his connection with the other defendants in any conspiracy, confederation or unlawful agreement as set forth in the indictment. I now ask that all of the evidence of this book, and each and every item read by the Government to the jury in the record from the book, be stricken from the record as against the [452] defendant Gorham on like grounds. Your Honor will note that during the reading of this record the word "Gorham" was not mentioned.

The COURT.—Of course, Mr. Kelly, it cannot hurt him. Of course, if that was all the evidence that was to be produced, the motion for a directed verdict would follow, but you will realize, of course, the rule that in the orderly presentation of the case, the whole thing cannot be presented at once, and that the *corpus delicti*, while it has to be estab-

lished, need not be established prior to the introduction in evidence.

Mr. KELLY.—I grant the point that the order of proof is in the sound discretion of the Court.

The COURT.—Motion denied.

Mr. KELLY.—Exception.

Mr. GILLIS.—One item that has been called to my attention, I still wish to call to the attention of the jury in this gray book, on page 92, the name "Gorham" appears, $60, with some lines drawn through it; on the top of page 93 "Gorham, $60," and on the same page, "Joe Gorham, $60."

Mr. O'CONNOR.—If your Honor please, I renew the motion I made as to the other items as to these items, with the understanding that it is overruled and an exception noted.

The COURT.—Yes.

Mr. SMITH.—May my motion be renewed in a like manner?

The COURT.—Yes.

Mr. KELLY.—In behalf of the defendant Gorham, I renew the motion, your Honor, and take an exception.

The COURT.—Yes.

(Rep. Tr. Vol. 1, pp. 27, 28.) [453]

III.

That the Court erred in overruling the motion of said defendant Gorham for a directed verdict of Not Guilty at the conclusion of the Government's case, said motion being based upon the following grounds:

That as a matter of law the evidence was not suf-

ficient to warrant the submission of the case to the jury, or to warrant the finding of a verdict of guilty, as hereafter more fully appears:

Mr. KELLY.—May it please the Court, on behalf of the defendant Gorham, I now move the Court to direct the jury to return as against him a verdict of Not Guilty, upon the ground that the Government has not offered sufficient evidence to submit the case to the jury as against him. In other words, on the ground that as a matter of law the evidence in this case is insufficient to warrant a submission of the case to the jury, or to warrant, if submitted to them, the finding of a verdict of guilty. I would ask the Court that the jury be excused for a few moments, so that I may briefly present the matter.

The COURT.—You want to make a motion, too, Mr. Taaffe?

Mr. TAAFFE.—Yes.

The COURT.—The statute requires the motion to be made in the actual presence of the jury.

Mr. TAFFEE.—I join, on behalf of the defendant Kissane, in the motion that has been made on behalf of the defendant Gorham, and on the same grounds.

Mr. SMITH.—For the purpose of the record, may the same motion be interposed on behalf of the defendants Marron and Birdsall, upon the grounds stated by Mr. Kelly in his request for a directed verdict as to the defendant [454] Gorham?

The COURT.—Yes.

Mr. O'CONNOR.—And, for the purpose of the

record, the same motion as to the defendant Mahoney, upon similar grounds.

Mr. GREEN.—I do not desire to join in the motion. I will submit my case to the jury.

(Rep. Tr. V. 5, p. 261.)

The COURT.—The motion is denied. Of course as to the other defendants, there is no question that there is sufficient evidence as to them to go to the jury.

Mr. KELLY.—May we note an exception on behalf of the defendant Gorham?

Mr. TAAFFE.—An exception on behalf of Kissane.

Mr. O'CONNOR.—Let the record show an exception in behalf of the defendant Mahoney.

Mr. SMITH.—Let the record show an exception on behalf of the defendants Marron and Birdsall.

The COURT.—Do you want an exception, Mr. Green?

Mr. GREEN.—No.

(Thereupon the jury returned into court.)

The COURT.—I believe, gentlemen, the rule requires a ruling to be made in the presence of the jury on these motions, also. The motions are denied.

Mr. KELLY.—I wish to note an exception in behalf of the defendant Gorham.

The COURT.—An exception may be noted on behalf of all the defendants.

(Rep. Tr. V. 5, p. 267.)

To which ruling of the Court said defendant Gorham then and there duly and regularly excepted.

IV.

That the Court erred in overruling the motion [455] of said defendant Gorham for a directed verdict of not guilty at the conclusion of said trial before the submission of said cause to the jury, which said motion was on the following grounds:

That the evidence offered against defendant Gorham is not sufficient as a matter of law to sustain any verdict other than that of not guilty, as hereafter more fully appears:

Mr. KELLY.—Prior to Mr. Taaffe addressing the Court, I move the Court on behalf of the defendant Gorham, for a directed verdict, on the ground that the evidence is insufficient, as a matter of law to sustain a contrary verdict.

The COURT.—I think the situation is stronger against you than it was before. The motion is denied. Now, Mr. Taaffe, I will hear you.

Mr. KELLY.—Note an exception.

(Rep. Tr. pp. 423, 424.)

To which ruling of the Court said defendant Gorham then and there duly and regularly excepted.

V.

That the Court erred in admitting in evidence the testimony of William Kenly Latham, a witness called on behalf of the Government in rebuttal over the objections of defendant Gorham, upon the following grounds:

That said evidence was not proper rebuttal.

Mr. GILLIS.—Q. You have already been sworn in this case, Mr. Latham. Mr. Latham, did you

visit 1249 Polk Street, the latter part of September, 1924?

Mr. SMITH.—Just a second, so that we may know what our position is. Is this supposed to be rebuttal, or what? [456]

Mr. GILLIS.—Supposed to be rebuttal.

Mr. SMITH.—Object to it on behalf of the defendant Mahoney, on the ground that the Government cannot produce rebuttal on that.

The COURT.—Overruled.

Mr. SMITH.—On the further ground that it is not proper rebuttal, if the Court please, to show that this man was not there. There is nothing to rebut.

The COURT.—I don't understand that.

Mr. SMITH.—I say that there has been no testimony even tending to show that this witness was not at 1249, so there is nothing to rebut.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

Mr. GILLIS.—Q. Your answer?

A. I was, yes, sir.

Q. Do you remember about when that was approximately? A. Sir?

Q. Do you remember approximately when that was?

A. Well, I could not give the exact date; it was around the latter part of September.

Q. What part of the flat did you go into?

A. I went into the rear part of it.

Q. The kitchen? A. Yes, sir.

Mr. SMITH.—So that the record may show the

entire matter without further objection, may our objection run to all this testimony?

The COURT.—No, I don't think so. I don't know what will be developed. You make your objections and the Court will rule.

Mr. GILLIS.—Q. Who did you see in the kitchen?

Mr. SMITH.—Objected to as improper rebuttal.

The COURT.—Overruled.

Mr. SMITH.—Also as incompetent, irrelevant and [457] immaterial.

The COURT.—Overruled.

Mr. KELLY.—The same objection.

The COURT.—Overruled.

Mr. SMITH.—Exception.

Mr. KELLY.—Exception.

Mr. GILLIS.—Q. At that time, who did you see in the kitchen?

A. I saw that gentleman over there. I do not know his name.

Q. Can you point out, as they sit there?

A. That one sitting next to Kissane, on this side.

Q. On this side? A. Yes, sir.

Q. That would be the side nearer the Judge's Bench? A. Yes, sir.

Q. Among the defendants?

The COURT.—Who is that?

Mr. GILLIS.—Let the record show that that is Mr. Mahoney.

The COURT.—That is correct?

Mr. SMITH.—That is correct.

Mr. GILLIS.—Q. What other defendants did you see there at that time?

A. While I was in there, that gentleman sitting on the other side of Mr. Kissane came in.

Q. That is the side nearer the door?

A. Yes, sir.

Mr. GILLIS.—The record may show that that is the defendant Gorham.

The COURT.—That is correct?

Mr. SMITH.—Yes, sir.

Mr. GILLIS.—Q. He came in at that time, did he? A. Yes, sir.

Q. And what was on the table in the kitchen?

A. Well, there was a bottle and some glasses.

Mr. SMITH.—We will object to that as improper rebuttal.

The COURT.—Overruled. [458]

Mr. SMITH.—Note the exception.

Mr. GILLIS.—Did you see any liquor there?

A. I did.

Q. Was there any poured out?

A. I poured out some myself.

Q. What was it? A. Gin.

Q. Poured out of a regular gin bottle?

A. Yes, sir.

Q. What was the defendant Mahoney doing?

A. He just came in and walked around. He didn't do anything that I could definitely state.

Q. Did Gorham have any conversation with him?

A. Well, they did, but I didn't pay any attention to what they said.

Q. You don't remember what they said?

A. I don't; I was disinterested in what was going on. I was there for the purpose of getting a drink, and I went out.

Q. Now, did you notice whether or not there was a cash register in the kitchen?

Mr. SMITH.—Objected to as incompetent rebuttal.

The COURT.—Overruled.

Mr. SMITH.—Note an exception.

A. There was a cash register in there.

Mr. GILLIS.—Q. Did you see any slot machines when you were in there that time?

Mr. SMITH.—The same objection.

The COURT.—The same ruling.

Mr. SMITH.—Note an exception.

A. I did.

Mr. GILLIS.—Q. Where was that?

A. That was in what I should take to be, had been the dining-room of this flat.

Q. Near the kitchen was it? A. Yes, sir.

Q. Now, from the conversation that occurred between Gorham and Mahoney, did it appear to you that they knew each other, and were on friendly terms, or otherwise?

Mr. TAAFFE.—That is objected to as called for the conclusion of the witness.

Mr. GILLIS.—Just how it appeared to him. [459]

The COURT.—Better put it, what was the nature of the relations, as you observed it?

A. Well, they spoke to each other; as to what they said, I couldn't recall.

The COURT.—Q. You mean that Sergeant Gorham there came into the kitchen when you were drinking there, and he was talking with Mahoney.

A. I do.

The COURT.—Go ahead.

Mr. GILLIS.—Q. Did Gorham stay in there for a few minutes?

A. To the best of my recollection, I left him there. I went right out and went down the stairs.

Q. After you had your drink? A. Yes, sir.

Q. Your drink—you poured your drink while he was there? A. Yes, sir.

Mr. GILLIS.—That is all.

Cross-examination.

Mr. KELLY.—Q. What date was this in September?

A. The latter part; I couldn't give the exact date.

Q. Couldn't you approximate the date?

A. I couldn't.

Q. Was that the best way you can put it down, the latter part of September?

A. It was; that was the best I could give you—I couldn't give you the exact time, because I didn't pay any attention to the date.

Q. What time of the day was it, or night?

A. It was in the forenoon. *A.* I should judge around 11:00 o'clock; maybe half-past eleven.

(Rep. Tr., pp. 416 to 420.)

To which ruling of the Court said defendant Gorham then and there duly and regularly excepted.

VI.

That the Court erred in abusing its judicial dis-

cretion in denying the motion of the defendant Gorham for a new trial, which motion was made upon the grounds as appears hereinafter in Sections 1, 2, 3, 4, 5, 6 and 7:

1. That the verdict was contrary to the evidence. [460]

2. That the verdict was contrary to the weight of the evidence.

3. That the verdict was contrary to the law as given to the jury by the Court.

4. That the Court erred in refusing instruction No. 1 requested by the defendant Gorham.

5. That the Court erred in admitting evidence contrary to the law.

6. That newly discovered and material evidence has come to light since the trial.

7. Errors of law occurring at the trial and excepted to by the defendant Gorham, to which ruling of the Court the defendant Gorham then and there duly and regularly excepted.

And, upon the following further grounds:

That the Court misdirected the jury in matters of law and erred in its decision on questions of law arising during the trial; that new evidence material to the defendant Gorham has been discovered which he could not with due and reasonable diligence produce at the trial.

VII.

That the Court erred in abusing its discretion and in denying the motion of the defendant Gorham made in arrest of judgment, which said motion

was made upon the grounds as appear in Section 1, 2 and 3, and 4, 5.

1. That said indictment does not charge any offense against the laws of the United States, nor does it charge said defendant with the doing of anything, the doing of which is prohibited by the laws of the United States.

2. That the said indictment does not state facts sufficient to constitute an offense against the laws of the United ——. [461]

3. That said indictment does not set forth facts sufficient in law to support the conviction.

4. That the defendants in said cause entered into a conspiracy to do the acts therein charged to have been done by them is a conclusion of law and does not state any cause or offense against the laws of the United States.

5. That allegation 7 of said indictment—"That in pursuance of the said conspiracy, combination, confederation and agreement herein in this indictment set out and to effect and accomplish the objects thereof and with the intent and for the purpose of effecting and accomplishing the objects thereof, the said defendant, Joseph Gorham, then and there being a duly and regularly qualified, appointed and acting police officer of the Police Force in the City and County of San Francisco, California, did, on or about the 31st day of March, 1924, at 1249 Polk Street, in the City and County of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this court, receive, as such police

officer, from said defendant, George Birdsall, *alias* George Howard, the sum of Ninety (90.00) Dollars, lawful money of the United States of America.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided."

a. That there is no statute of the United States of America preventing a police officer or police sergeant of the City and County of San Francisco, State of California, from receiving money from any person.

b. That it is no crime nor is it forbidden by the laws of the State of California for a police officer or a [462] police sergeant of the police department of the city and county of San Francisco, State of California to receive money from any person.

c. That said paragraph setting forth said alleged overt act does not state that the said sum of $90 was received by said Joseph Gorham as such police officer or sergeant for any unlawful purpose.

d. That said paragraph does not state that said Joseph Gorham received said sum of $90 for the purpose of permitting the other defendants or any or either of them charged in said indictment to violate any law or laws of the United States.

To which ruling, the defendant Joseph Gorham, then and there duly and regularly excepted.

VIII.

That the Court erred in rendering judgment and imposing sentence upon the defendant Joseph Gor-

ham for the reason that said judgment and sentence and the verdict of the jury therein, upon which said judgment and sentence were based, were not supported by the evidence introduced herein.

IX.

That the Court erred in denying the preliminary motion made by the defendant George Birdsall for the return and the suppression of Government's Exhibit No. 3 in evidence, upon the grounds that search-warrant issued in said cause was not sufficient to warrant the seizure of said Government's Exhibit No. 3 in evidence.

That said Government's Exhibit No. 3 in evidence was seized without warrant of law, or without authority at all, and in violation of the rights of the defendants under the fourth and fifth amendment to the Constitution of the United States, and that the seizure of said book [463] made the officers seizing the same, trespassers *ab initio,* to which ruling of the Court an exception was then and there duly taken.

X.

That the Court erred at the trial of said cause in refusing to grant the motion to suppress and return said Government's Exhibit No. 3 in evidence, upon the grounds that had theretofore been enumerated in the petition of defendant George Birdsall to return and suppress said exhibit, as hereafter more fully appears:

Mr. GILLIS.—Q. I ask you if you recognize that book? A. Yes.

Q. When did you first see that book?

A. When we got—

Mr. SMITH.—Just a moment: Before we have any testimony on this, I would like to ask the witness a few questions if I may.

Mr. GILLIS.—Upon what theory?

Mr. SMITH.—I want to find out something about the right to take the book.

Mr. GILLIS.—I do not think, your Honor, he has any right to cross-examine now on this proposition; wait until we introduce it in evidence.

The COURT.—It may be that counsel has some point with regard to the question of its admissibility, the manner in which it was found, and the manner in which it was taken.

Mr. GILLIS.—I have not offered it in evidence yet.

The COURT.—You go ahead with your examination and you may examine him before it is admitted in evidence.

Mr. SMITH.—I show you a paper and I will ask you—

The COURT.—No, I want Mr. Gillis to finish the identification, and then you may ask any questions you desire. [464]

Mr. GILLIS.—Q. When did you first see this book?

A. When we went in, Agent Howard and I went in to where we found the champagne in the closet, in the front room.

Q. It was on October 2, 1924. A. Yes.

Q. At 1249 Polk St.? A. Yes.

Q. Just where did you find this book?

A. In those premises, in that closet, there is a wash-stand, and this book was on the wash-stand under the cigar-box, with a lot of currency in it.

Q. Was the closet locked? Was there anything else in the closet or on the floor of the closet?

A. Just the cigar-box that was full of currency and the champagne that was in the trap in the floor.

Q. This was off one of the rooms, was it?

A. It was in one of the rooms, the front room.

Mr. GILLIS.—I offer this book in evidence and ask that it be marked U. S. Exhibit 3.

Mr. SMITH.—To which, of course, we will object.

The COURT.—You can ask your questions first.

Mr. SMITH.—Q. Mr. Whittier, I show you a paper, and I will ask you if you have ever seen that before?

The COURT.—What is that, the search-warrant?

Mr. SMITH.—That is the search-warrant.

The COURT.—The search-warrant that was served at the time.

Mr. SMITH.—Yes, it is a copy of the search-warrant, your Honor.

Q. What is that paper?

The COURT.—It identifies itself. Do you want to put it in evidence.

Mr. SMITH.—No, I do not as yet.

Q. It is a copy, is it not, of the search-warrant, that you executed on the 2d of October, on 1249 Polk Street? A. Yes.

Q. You were fully advised as to the contents of the warrant at the time that you served it, were you not? A. We were. [465]

Q. You know, do you not, that the search-warrant only authorized the search of those premises for certain liquors?

Mr. GILLIS.—I object.

The COURT.—Doesn't it speak for itself?

Mr. SMITH.—Yes, it does.

The COURT.—Why spend time on it?

Mr. SMITH.—I want to show this witness was thoroughly familiar with the contents of the warrant.

The COURT.—It does not make any difference whether he was, or not; if it was a valid search-warrant, authorizing the taking of this book, it speaks for itself; if not, it does not make any difference whether he knew it or not.

Mr. SMITH.—At this time we will ask that all testimony elicited by the Government from this witness with reference to this gray book be stricken out on the ground that it is immaterial, irrelevant and incompetent, there is no foundation for it, and the warrant did not authorize the seizure of that record.

The COURT.—Was this included in your motion before?

Mr. SMITH.—Yes, your Honor, that was one of the motions.

The COURT.—Overruled.

Mr. SMITH.—May the objection, for the purpose of the record show that this book was not de-

scribed nor designated in the warrant as one of the things to be searched or seized?

The COURT.—The warrant is in evidence and speaks for itself.

Mr. SMITH.—I want the record to show what my objections are.

The COURT.—Yes.

Mr. SMITH.—Furthermore, in the case of United States [466] vs. Goulin, the Supreme Court of the United States held that man's records, or books, or papers could not be used as evidence against him, because it would be tantamount to telling the man to take the witness-stand against himself; in either event, whether his records are used, or whether he is compelled to take the stand as against himself, he is an unwilling source of information concerning his actions. Now, we submit that it is indirectly in violation of his constitutional guarantee; that is the second ground. The first ground is that it was unlawfully taken under the warrant.

The COURT.—Overruled.

Mr. SMITH.—Exception.

(Rep. Tr., pp. 18 to 21.)

to which an exception was then and there duly and regularly taken.

XI.

That Court erred by its refusal to give the jury Instruction No. 1, as requested by the defendant Gorham, which instruction was as follows:

"I instruct you that the evidence in this case is insufficient as a matter of law to war-

rant the conviction of the defendant, Gorham, and you are therefore instructed to return a verdict of "Not Guilty" as to defendant Gorham."

to which ruling of the Court an exception was then and there duly taken.

XII.

That the Court erred by its refusal to give Instruction No. 2 as set out in the requested instructions of the defendant, Patrick Kissane, which instruction was as follows:

"You are further instructed that in considering the [467] evidence introduced in order to determine whether or not a conspiracy was in existence between the defendants on trial here, to violate the terms, conditions and provisions of the Volstead Act, whether or not the defendants, Patrick Kissane and Joseph Gorham, conspired with each other, and with the other defendants on trial here to effect and accomplish the object of said conspiracy, you must disregard the evidence given with reference to the entries contained in the book marked, 'Government Exhibit in Evidence Number 3,' and give no consideration to the evidence therein contained, unless from the evidence introduced, exclusive of the evidence contained in said Exhibit number 3, you are convinced to all certainty and beyond all reasonable doubt, that a conspiracy existed between all of the defendants to do the acts charged in said indictment."

That the Court erred by its refusal to give Instruction No. 3, as requested by the request for instructions of defendant, Patrick Kissane, which was as follows:

> "The defendant Patrick Kissane is a Police Officer and as to public offense to the grade of misdemeanors, he has no authority to make arrests unless armed with a search-warrant, save and except in those cases where the offense is committed in his presence. (Ferguson vs. Superior Court, 26 Cal. App. 554.)"

That the Court erred by its refusal to give Instruction No. 4, as requested by the defendant, Patrick Kissane, in his request for instructions, which instruction was as follows:

> "While common repute may be received as competent evidence of the character of the premises conducted at 1249 Polk Street, San Francisco, California, the failure of Patrick Kissane to act upon such common repute in arresting [468] the Proprietor or visitors thereof, does not constitute a neglect of his official duties. (Ferguson vs. Superior Court, 26 Cal. App. 554.)"

to which failure of the Court to give such requested instruction, an exception was then and there duly and regularly taken.

WHEREFORE, for the many manifest errors committed by the said Court, the defendant, Joseph Gorham, through his attorney, prays that said sentence and judgment of conviction be re-

versed, and for such other and further relief as to the Court may seem meet and proper.

WILLIAM A. KELLY,
Attorney for Joseph Gorham.

Due service and receipt of a copy of the within assignment of error is hereby admitted this 20th day of January, 1925.

STERLING CARR,
U. S. Attorney.
KENNETH C. GILLIS,
Asst. U. S. Attorney.

[Endorsed]: Filed Jan. 20, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [469]

In the Southern Division of the District Court of the United States for the Northern District of California, First Division.

No. 15,708.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOSEPH GORHAM et al.,
Defendants.

ORDER ALLOWING WRIT OF ERROR (JOSEPH GORHAM).

After filing and reading the petition for writ of error filed in the above-entitled action by Joseph Gorham, one of the defendants herein through

his attorney William A. Kelly, Esq., wherein said defendant Gorham prays this Court for an order allowing writ of error to the Circuit Court of Appeals of the Ninth Circuit, and wherein prays the judgment in said cause rendered as appears in said judgment entered herein be superseded, stayed and suspended pending determination of said writ of error and that said defendant, Joseph Gorham, be admitted to bail, and that an order issue for a full and complete transcript of the record of the proceedings had herein, directing the Clerk of this court to forward same to the Clerk of the United States Circuit Court of Appeals of the Ninth Circuit,—

NOW, THEREFORE, it is hereby, ORDERED that the writ of error prayed for in said petition of said Joseph Gorham, be and the same is hereby allowed. It is further,

ORDERED, that the sentence and judgment heretofore interposed on said defendant Joseph Gorham, be stayed, [470] superseded, and suspended, pending decision upon said writ of error, and that defendant Joseph Gorham, be admitted to bail in the sum of $5000.00, and it is further,

ORDERED, that a full and complete transcript of the record and proceedings in said cause be transmitted by the Clerk of this Court to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and it is further,

ORDERED, that bond for costs upon said writ of error be and the same is hereby fixed in the sum of $250.00.

Dated: January 20th, 1925.

JOHN S. PARTRIDGE,
United States District Judge.

[Endorsed]: Filed January 20, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [471]

In the District Court of the United States, for the Northern District of California, First Division.

No. 15,708.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE HAWKINS et al.,

Defendants.

PETITION FOR WRIT OF ERROR (JOSEPH E. MARRON AND GEORGE BIRDSALL).

Now come defendants Joseph E. Marron and George Birdsall in the above-entitled case and feeling themselves aggrieved by the judgment of the above-entitled court, made and entered herein on the 14th day of January, 1925, whereby it was ordered and adjudged that the defendant Joseph E. Marron be imprisoned in the penitentiary for the period of two years and be fined in the sum of Ten Thousand Dollars ($10,000.00), and the defendant George Birdsall be imprisoned in the penitentiary for a period of Thirteen Months and be fined in the sum of One Thousand Dollars ($1,000.00);

and your petitioners show that they were advised by counsel and that they aver that there was and is manifest error in the records and proceedings had in said cause and in the making, rendition and entry of said judgment and sentence to the great injury and damage of your petitioners, all of which errors will be more fully made to appear by an examination of said record and by examinations of the bill of exceptions and assignment of errors filed herein and presented herewith and to that end thereafter that the said judgment, sentence, proceedings, may be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, and now pray that a writ of error may be issued directed therefrom [472] to said Southern Division of the District Court of the United States, for the Northern District of California, returnable according to law and the practice of court, and that there will be directed to be returned, pursuant thereto, a true copy of the record, bill of exceptions, assignment of errors, and all proceedings had in said cause; that the same may be removed to the United States Circuit Court of Appeals, for the Ninth Circuit, to the end that the errors, if any have appeared, may be corrected, and full and speedy justice may be done to your petitioners, and during the pendency of this writ of error, all proceedings in this court be suspended, stayed and superseded until the final determination of said writ of error. That during the pendency of said writ of error and the final determination thereof, the defendant Joseph E. Marron be admitted to

bail in the sum of ——— dollars and the defendant George Birdsall be admitted to bail in the sum of ——— dollars.

Dated: January 20, 1925.

HUGH L. SMITH,
Attorney for Defendant Joseph E. Marron.

HUGH L. SMITH,
CHAS. J. WISEMAN,
Attorneys for Defendant George Birdsall.

Receipt of a copy of the within petition is hereby admitted this 20th day of January, 1925.

STERLING CARR,
By THOS. J. RIORDAN,
Asst.

[Endorsed]: Filed Jan. 20, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [473]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 15,708.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE HAWKINS, WALTER BRAND, JOSEPH E. MARRON, *alias* EDDIE MARRON, GEORGE BIRDSALL *alias* GEORGE HOWARD, CHARLES MAHONEY, PATRICK KISSANE and JOSEPH GORHAM,

Defendants.

ASSIGNMENT OF ERRORS (JOSEPH E. MARRON AND GEORGE BIRDSALL).

Now come defendants, Joseph E. Marron and George Birdsall, in the above-entitled cause, and in connection with their petition for a writ of error herein make the following assignment of errors which they aver occurred upon the trial of said cause, to wit:

I.

The Court erred in refusing to grant an order directing the jury to return a vedict of not guilty in respect to each of them, to which ruling of the Court said defendants then duly and regularly excepted.

II.

The Court erred in rendering judgment and in imposing sentence upon defendant Joseph E. Marron for the reason that said judgment and sentence, and the verdict of the jury herein upon which said judgment and verdict were based, were not supported by evidence introduced herein; to which ruling of the Court said defendants then duly and regularly excepted.

III.

The Court erred in rendering judgment and in imposing sentence [474] upon defendant George Birdsall for the reason that said judgment and sentence, and the verdict of the jury herein upon which said judgment and sentence were based were not supported by the evidence herein; to which ruling of the Court said defendants then duly and regularly excepted.

IV.

That there was no evidence adduced and none appears in the record showing that the defendants Joseph E. Marron and George Birdsall at any time or place, and particularly at, or in, the city and county of San Francisco, Southern Division of the Northern District of California, and within the jurisdiction of the above-entitled court on or about the 1st day of May, 1923, and thereafter up to and including October 3d, 1924, or otherwise, or at all, combined, confederated and conspired, or combined, or confederated or conspired, or agreed with each other, or with any of the defendants named in said indictment, or all of said de-

fendants named in said indictment, or with any person or persons, or otherwise, or at all, wilfully, unlawfully, feloniously and knowingly made any or all the acts, or each, or any of them, as set forth in the indictment on file herein, to which said indictment reference is hereby made, and the allegations, and each of them, are hereby referred to as if they were expressly incorporated herein.

V.

The Court erred in not granting the following motions made on behalf of the defendant Joseph E. Marron, and prior to the time of the trial of said cause, which said motions were made on the —— day of ——, 1924, and which said motions are as follows:

(a) A plea in bar and a petition to suppress evidence with respect to overt act No. 9 as set out in said indictment and filed herein, to which reference is hereby made on the ground that the [475] matters and things set forth in paragraph nine and overt act in said indictment are identical with the matters and things set forth in the information filed in the above-entitled court on April 26th, 1923, information No. 13,362, to which said information defendant Marron, heretofore had pleaded guilty and satisfied fully judgment as rendered therein by reason thereof that defendant Marron had been once in jeopardy as to the matters and things set forth in said paragraph nine of overt acts in said indictment, to which ruling of the Court said defendant Marron duly and regularly excepted.

(b) A petition to suppress evidence with respect to overt act No. 10 as set out in said indictment and filed herein, to which reference is hereby made upon the grounds that evidence had been secured by Federal Prohibition Agents as a result of an unlawful search and seizure occurring on the 26th day of August, 1924, at 3047 California Street, and that any evidence obtained by said unlawful search and seizure could not properly be admitted in the trial of said cause and contravention of defendant Marron's constitutional rights under the fourth and fifth amendments of the Constitution of the United States of America, and, upon the further grounds set forth in said petition on file herein, to which reference is hereby made as though expressly incorporated, to which ruling of the Court said defendant Marron duly and regularly excepted.

(c) Petition to suppress evidence with respect to overt act No. 11 as set out in said indictment and filed herein to which reference is hereby made upon the grounds that evidence had been secured by Federal Prohibition Agents as a result of the unlawful search and seizure occurring on the 3d of September at 2922 Sacramento Street, and that any evidence obtained by said unlawful [476] search and seizure could not properly be admitted in the trial of said cause and contravention of defendant Marron's constitutional rights under the fourth and fifth amendments of the Constitution of the United States of America, and, upon the further grounds set forth in said petition on file

herein, to which reference is hereby made as though expressly incorporated, to which ruling of the Court said defendant Marron duly and regularly excepted.

(d) Petition to suppress evidence made on behalf of defendants Birdsall and Mahoney, which petition was granted as to the defendant Birdsall and denied as to the defendant Mahoney and as to the other defendants named in said indictment; said petition being based upon the following grounds: That the search-warrant issued on the 2d day of October, 1924, and executed on the 3d day of October, 1924, was improperly issued for the reason that no probable cause existed for the issuance of said warrant on said date, and upon the further ground that no showing was made to the United States Commissioner who issued said warrant that there was probable cause for the issuance of same, for the reason that said warrant was issued upon the ground that a sale of liquor had been made at the premises known as 1249 Polk Street on the 27th day of September, 1924, and that since said 27th day of September, 1924, the premises known as 1249 Polk Street have been thouroughly searched on the 2d day of October, 1924, by Federal Agent Whittier, and at that time all intoxicating liquors had been removed therefrom, and that said Federal Agent Whittier executed said warrant on the 3d day of October, 1924, and knew of his own knowledge that the search of October 2d, 1924, had been thorough and complete, and had no reason to believe that grounds existed

for the execution and issuance of another search-warrant, to which said ruling defendant [477] Marron then and there duly and regularly excepted.

VI.

That Court erred in not granting the following motions made on behalf of the defendant George Birdsall, and prior to the time of the trial of said cause, which said motions were made on the —— day of ——, 1924, and which said motions are as follows:

(a) A plea in bar and a petition to suppress evidence with respect to overt act No. 5 as set out in said indictment and filed herein to which reference is hereby made on the ground that the matters and things set forth in paragraph five and overt act in said indictment are identical with the matters and things set forth in the information filed in the above-entitled court on May ——, 1924, information No. 15,-018, to which said information defendant Birdsall heretofore had pleaded guilty and satisfied fully judgment as rendered therein by reason thereof that defendant Birdsall had been once in jeopardy as to the matters and things set forth in said paragraph 5 of overt acts in said indictment, to which ruling of the Court said defendant Birdsall duly and regularly excepted.

(b) A petition to return property and to suppress evidence made upon the following grounds: that prohibition agents on the 2d day of October, 1924, acting under a purported search-warrant

authorizing them to search for and seize the following described property, to wit:

> Intoxicating liquor, to wit, alcohol, brandy, wine, whiskey, rum, gin, beer, ale, porter, sherry wine, port wine, jackass brandy, corn whiskey, wine of pepsin, neuropin, pepsin rennin, fermented grape juice and spirituous, vinous, malt and fermented liquors, liquids and compounds by whatever name called containing one-half of one per centum or more of alcohol and fit for use for beverage purposes, stills, worms, coils, mashes, goosenecks, hydrometers, essences, caramel, coloring materials, boilers;

seized at the time that said search-warrant was executed certain personal property not authorized to be seized by said warrant, to [478] wit, certain other property, records and books of account, which private records, papers and books of account were and are the private and personal property of said defendant Birdsall; that said seizure was and is unlawful, unreasonable and unwarranted, and is and was in direct violation of defendant Birdsall's constitutional rights guaranteeed under the fourth and fifth amendments to the Constitution of the United States of America, and, upon the further grounds that said Federal Prohibition agents by reason of exceeding the authority vested in them by said warrant in the seizure of said records, papers and books of accounts, became trespassers *ab initio* and upon the following grounds as set forth in said petition to return property and sup-

press evidence on file herein, reference to which is hereby made as though expressly incorporated herein, and to which ruling of the Court said defendant Birdsall duly and regularly excepted.

(c) A petition to return property and to suppress evidence made upon the following grounds: That said Federal Prohibition Agents by reason of exceeding the authority vested in them by said warrant in the seizure of said records, papers and books of accounts became trespassers *ab initio* and upon the following grounds as set forth in said petition to return property and suppress evidence on file herein, reference to which is hereby made as though expressly incorporated herein, and to which ruling of the Court said defendant Birdsall duly and regularly excepted.

VII.

The Court erred in admitting evidence over the objection of the defendants the following statement or document, to wit: U. S. Exhibit No. 1, being a lease dated March 30, 1922, of the premises No. 1249 Polk Street by George Hawkins, the full substance of the evidence thus admitted being set out in the following extract from [479] the testimony of the witness Stevens on direct examination by counsel for plaintiff:

Q. Have you a record of leases, or contracts for leases on 1249 Polk Street during the years 1923 and 1924? A. Yes.

Q. Are they contained in these books that I have been showing you? A. Yes.

Q. Will you kindly turn to them.

A. Yes.

Q. At 1249 Polk Street? A. There.

Q. Have you one prior to this? A. Yes.

Q. The one to which you are now turning to do you know who signed that, Mr. Stevens?

A. It is signed by George Hawkins?

Q. Is that a lease for 1249 Polk Street?

A. Yes, for one month—on a month-to-month basis.

The COURT.—What is the date?

A. It is dated March 30, 1922, renting the premises on a month-to-month basis.

Mr. GILLIS.—I have a photostatic copy of this, and if you have no objection upon that ground I will ask that it be introduced evidence in place of the original, so that Mr. Stevens may take the book.

Mr. SMITH.—We will object to the introduction of the original upon the ground that it is immaterial, irrelevant and incompetent, there is no foundation laid for the introduction of it, there has been no conspiracy shown to have existed between Hawkins and any other of the defendants. Hawkins is absent, so we cannot interpose any objection for him. We do not know where Hawkins is, he is not a defendant here.

The COURT.—Objection overruled. Have you any objection to the photostatic copy being introduced instead of the original.

Mr. SMITH.—No, if it is a true copy we have no objection.

Mr. O'CONNOR.—On behalf of the defendant Mahoney we will object to its introduction on the ground that the instrument antedates the date the conspiracy is set forth in the indictment.

The COURT.—Overruled.

Mr. O'CONNOR.—Exception.

Mr. GILLIS.—I will ask that it be introduced in evidence and marked "U. S. Exhibit 1."

and to which ruling of the Court defendants duly and regularly excepted.

VIII.

The Court erred in admitting in evidence over the objection of the defendants, the following statement or document, to wit: U. S. Exhibit No. 2, being a lease on the premises at 1249 Polk Street, signed by Ed Marron dated November 2, 1923. The full substance of the evidence thus admitted is set out in the following extract from the testimony of the witness Stevens on direct examination by counsel for plaintiff:

Q. Now, the next lease that you turn to on 1249 Polk Street, Mr. Stevens, is signed by whom? A. Signed by Ed Marron.

Q. And what is the date of that?

A. November 2, 1923.

Mr. GILLIS.—We ask that that be introduced in evidence and [480] marked "U. S. Exhibit 2." I ask that the photostat be introduced in place of the original, if there is no objection to it upon that ground.

Mr. SMITH.—We will object to the introduction of that one offered upon the same grounds urged to the introduction of the first.

The COURT.—Overruled.

Mr. SMITH.—Exception. Now, we consent to the introduction, as long as the Court has so ordered, of the photostat copy.

To which ruling of the Court the defendants duly and regularly excepted.

IX.

The Court erred in overruling the objection interposed by the defendants to the following questions propounded to the witness Whittier on his direct examination by counsel for plaintiff:

Q. Did you go into 1249 Polk Street?

A. I did.

Q. Did you have a search-warrant for the place? A. We did.

Q. Did you find any liquor there at that time?

Mr. SMITH.—Just a moment, may it please the Court: The Court recalls that heretofore there have been several motions made for the exclusion of evidence. Now, will the Court consider as having been made, for the purpose of the record, a renewal of the motions at this time with reference to the raid of 1240 Polk Street on the 2d of October?

Mr. SMITH.—We object to the introduction of any testimony, or any evidence, upon the same identical grounds that we urge in our petition for the suppression of evidence;

that petition is on file, and is a part of the records.

The COURT.—Overruled.

Mr. SMITH.—Exception.

The COURT.—You may answer.

A. Yes, we found liquor there.

Mr. GILLIS.—Q. What did you find?

A. We found 16 pint bottles of champagne in a closet, in the front room, in a trap, and in that same little closet we found a gray ledger, a gray book, nine one-fifth gallon bottles of white wine, five one-fifth gallon bottles of whiskey, two quart bottles of whiskey, one one-fifty gallon bottle of gin three-quarters full, one-fifth gallon bottle full of gin, two bottles Bacardi rum, one one-fifth gallon bottle of brandy, two one-fifth gallon bottles of Scotch whiskey, one one-fifth gallon bottle one-half full Scotch whiskey, one bottle of Vermuth, one bottle picon, one-third full, one one-gallon bottle three-quarters full of gin, eight bottles sweet wine, one bottle one-third full of whiskey, one one-gallon bottle one-sixth full of sweet wine, two sacks of Canadian beer, and 174 bottles of home brew beer.

To which ruling of the Court the defendants duly and regularly excepted. [481]

X.

The Court erred in admitting in evidence over the objection of the defendants the following document, to wit: U. S. Exhibit No. 3, entitled, a ledger.

Q. I will show you a book, Mr. Whittier, and ask you to look at it; do not make any statements with reference to it until you have looked at it. A. That is the book.

Mr. GILLIS.—Q. I ask you if you recognize that book? A. Yes.

Q. When did you first see that book?

A. When we got—

Mr. GILLIS.—Q. When did you first see this book?

A. When we went in, Agent Howard and I went in to where we found the champagne in the closet, in the front room.

Q. It was on October 2, 1924? A. Yes.

Q. At 1249 Polk Street? A. Yes.

Q. Just where did you find this book?

A. In those premises, in that closet, there is a wash-stand, and this book was on the wash-stand under the cigar-box, with a lot of currency in it.

Q. Was the closet locked?

A. Yes, the closet was locked.

Q. Was there anything else in the closet or on the floor of the closet?

A. Just the cigar-box that was full of currency and the champagne that was in the trap in the floor.

Q. This was off one of the rooms, was it?

A. It was in one of the rooms, the front room.

Mr. GILLIS.—I offer this book in evidence and ask that it be marked U. S. Exhibit 3.

Mr. SMITH.—To which, of course, we will object.

The COURT.—You can ask your questions first.

Mr. SMITH.—Q. Mr. Whittier, I show you a paper, and I will ask you if you have ever seen that before?

The COURT.—What is that, the search-warrant?

Mr. SMITH.—That is the search-warrant.

The COURT.—The search-warrant that was served at the time?

Mr. SMITH.—Yes, it is a copy of the search-warrant, your Honor. Q. What is that paper.

The COURT.—It identifies itself. Do you want to put it in evidence?

Mr. SMITH.—No, I do not as yet. Q. It is a copy, is it not, of the search-warrant that you executed on the 2d of October, on 1249 Polk Street? A. Yes.

Q. You were fully advised as to the contents of the warrant at the time that you served it, were you not? A. We were.

Q. You know, do you not, that the search-warrant only authorized the search of those premises for certain liquors?

Mr. GILLIS.—I object.

Mr. SMITH.—I want to show this witness was thoroughly familiar with the contents of the warrant.

The COURT.—It does not make any difference whether he was, or not; if it was a valid search-warrant, authorizing the taking of this book, it speaks for itself; if not, it does not make any difference whether he knew it or not. [482]

Mr. SMITH.—As this time we will ask that all testimony elicited by the Government from this witness with reference to this gray book be stricken out on the ground that it is immaterial, irrelevant and incompetent, there is no foundation for it, and the warrant did not authorize the seizure of that record.

The COURT.—Was this included in your motion before?

Mr. SMITH.—Yes, your Honor, that was one of the motions.

The COURT.—Overruled.

Mr. SMITH.——May the objection, for the purpose of the record, show that this book was not described nor designated in the warrant as one of the things to be searched or seized?

The COURT.—The warrant is in evidence and speaks for itself.

Mr. SMITH.—I want the record to show what my objections are.

The COURT.—Yes.

Mr. SMITH.—Furthermore, in the case of United States vs. Goulin, the Supreme Court of the United States held that a man's records, or books, or papers could not be used as

evidence against him, because it would be tantamount to telling the man to take the witness-stand against himself; in either event, whether his records are used, or whether he is compelled to take the stand as against himself, he is an unwilling source of information concerning his actions. Now, we submit that it is directly in violation of his constitutional guarantee; that is the second ground. The first ground is that it was unlawfully taken under the warrant.

The COURT.—Overruled.

Mr. SMITH.—Exception.

Mr. SMITH.—May the record show an exception to all of your Honor's rulings?

The COURT.—Yes.

Q. Did you have any conversation with Mr. Birdsall at that time? A. Yes.

Q. What was that conversation?

A. He stated that he owned the place, and gave the name of Howard.

Q. At that time.

A. Yes; he stated he owned the place; he said that he bought it out recently from Marron.

Q. Anything else? A. Not at all.

Q. Did you have any talk with him at all with reference to the book that has been introduced in evidence?

A. He wanted us to leave the book, did not want the boys to take the book; I left the book on the dining-room table while I was

making out the warrant, and Howard, I believe, grabbed the book up at the time to hold it, and he said, "Can't you leave the book here?" and I said, "No, we have to take it."

The COURT.—Let the search-warrant be marked in evidence as having been used upon Mr. Smith's objection.

Mr. SMITH.—Let the record show that the copy of the search-warrant was introduced in evidence by the defendant first.

(The copy of the search-warrant was marked "Defendants' Exhibit 'A.' ")

To which ruling of the Court the defendants duly and regularly excepted. [483]

XI.

The Court erred in permitting counsel for plaintiff over the objection of the defendants to read to the jury the contents of the book, the full substance of which is set out in the following:

Mr. GILLIS.—Gentlemen of the jury, I call your attention—

Mr. SMITH.—Just a moment: may it please the Court, at this time I will object on behalf of the defendants that I represent to the contents of this book being read to the jury, for the reason that no foundation has been laid, and upon the further ground that it is immaterial, irrelevant and incompetent; there has been nothing done with the book to identify it or show what the entries are, or anything of that sort.

The COURT.—Overruled.

Mr. SMITH.—Exception.

Mr. O'CONNOR.—As to the defendant Mahoney, it is objected to on the ground it is hearsay.

The COURT.—The same ruling.

Mr. O'CONNOR.—Exception.

(Thereupon a short recess was taken.)

Mr. GILLIS.—I will call your attention, gentlemen, to a few of the things in this book; for instance, on page 21 I call your attention to the fact, first, of an item here, "E. Marron, $500, rent $100, W. Brand $400." Then on page 31 we have "W. Brand $408.97, E. Marron $603.08." Then we go to page 36, and we have at the top here, "Bird," with a list of notations under it, and here, lower down, "18/23, Birdsall drew," with "20" after it, crossed out "Drew" underneath that, "20, 20, 20." On page 46 we again have the name "Birdsall." On page 46 we again have the name "Birdsall." On page 54 we again have the name "Birdsall, Mahoney," with different items listed underneath. On page 71 abbreviated, "Bird" and 'Mah" on the other side; "Mahoney" written out there. Page 69, we have "Birdsall, Mahoney, Birdsall, Birdsall." On 75 we have "Mah" again, and "Bird"; here are two Birdsalls; on 81 we again have "Mah" and "Birdsall," 98 again the same thing appearing, "Mah" and "Bird"; on page 93 the same, listed in the same way; 99, a similar notation; on 105 we have "Geo." and

"Chas." there, the first name. I call your attention to page 107 on which appears a summary of the profit and loss for September, 1924, showing sales of $5,624.50, cigar sales $5.65, slot machines $254, total $5,884.15, with a gross profit of $2,552.55, and expenses, salaries, rents, and then a blank space filled with cross-marks, $170, profit $1,187, and we have then the initials, "E. M. $600," "balance to divide, $587.10"; again, "one-half E. M. $293.55, one-half G. B. $295.55." Then I will call your attention to page 34, an item in the center of the page after "17/23," which is marked "Gift Kissane," and above the word "Kissane" is written the word "Police." Then on page 51 we have the word in the center of the page, "Police $100, and the word "Kissane $5." On page 60 we again have Kissane on the 10th, $5; on page 68, for March, we again have on March 23, "Kissane $5"; 9th, "Kissane $5"; [484] on the 16th, $5, on the 23d, $5; and on the 30th, "Kissane $5."

On page 74, for the month of April, we have on the 6th, "Kissane $5," on the 13th marked "Gift $5," on the 20th "Gift $5," on the 27th "Kissane $5."

On page 80 for the month of May we have on the 4th, $5, on the 11th $5, on the 25th $5, and on the 17th "Kissane $5."

Then on page 86, for the month of June, we have on June 1, "Kissane $5," on the 8th,

"Kissane $5," on the 15th "Kissane $5," on the 22d, "Police $15."

On page 92 for July, we have on the 6th, "Kissane $5," on the 13th "Kissane $5," on the 20th, "Kissane $5," on the 27th, "Kissane $5."

On page 98 for the month of August we have on the 3d, "Kissane $5," on the 10th, "Kissane $5," on the 16th "Kissane $5," and on the 24th "Kissane $15."

On page 104 for the month of September we have on the 21st, "Kissane $15," on the 28th "Kissane $5."

Now, I call your attention to page 69, and an item marked on page 69, toward the bottom of the page, "Gift, $60," and underneath, as a matter of fact, the last item—this is for March, 1924, "New Police, $90."

On page 74 we have "Gift $90," on the 16th, and on the 27th we have "Gift $60."

On page 80 we have "Police, on the 22d, $90," and on the 26th "Police $60."

On page 86 we have on the 14th of June, "police $150."

On page 92 we have "Gift $150."

On page 98 we have "Gift Pl. $150." That is August 11.

On page 104, September 15, we have "Gift $150."

I call your attention to page 103, which gives a list of the stock that they had on hand

at the end of September of that year, including whiskey, rum, sherry and gin.

I call your attention to page 101, which is the profit and loss statement for August, 1924, showing a net profit of $796.95, E. M., $620, Balance $176.65; Underneath that "1/2 E. M. $88.33, 1/2 G. B. $88.32." The same kind of a recapitulation for July, 1924, on page 94; also on page 71 for the month of March which is a stock account, showing the different stock on hand at the end of March.

On page 64, February 29, Stock on hand, including bourbon, Scotch, rye, *Plymoth* gin, Vermuth, Brandy, beer, Sherry.

Mr. O'CONNOR.—At this time, if your Honor please, I ask the Court to instruct the jury to disregard the items read from the book by Mr. Gillis as to the defendant Mahoney on the ground that they are immaterial, irrelevant and incompetent, hearsay, no foundation laid for their introduction, and that there has thus far not been established *prima facie* case of conspiracy as to the defendant Mahoney.

The COURT.—Motion denied.

Mr. O'CONNOR.—Exception.

Mr. SMITH.—I will ask for the same instruction with reference to the defendant Marron, also the defendant Birdsall. [485]

The COURT.—The same ruling.

Mr. SMITH.—And upon the further ground that the record, itself, discloses nothing that is connected with the thing that is

alleged to be a conspiracy; there is nothing to connect the record that has been read with the conspiracy that is charged.

The COURT.—Motion denied.

Mr. SMITH.—Exception.

Mr. GILLIS.—One item that has been called to my attention, I still wish to call to the attention of the jury in this gray book, on page 92, the name "Gorham" appears, $60, with some lines drawn through it; on the top of page 93 *"Gorman,* $60," and on the same page, "Joe Gorham, $60.

Mr. O'CONNOR.—If your Honor please, I renew the motion I made as to the other items as to these items, with the understanding that it is overruled and an exception noted.

The COURT.—Yes.

Mr. SMITH.—May my motion be renewed in a like manner?

The COURT.—Yes.

XII.

The Court erred in admitting in evidence over the objection of the defendant U. S. Exhibits Nos. 4, 5, 6, 7 and 8 for identification, being bottles.

Mr. SMITH.—These are objected to on the ground that they are incompetent, irrelevant, immaterial and not binding upon the defendant Marron.

The COURT.—Overruled. [486]

Mr. SMITH.—We note an exception as to each ruling on behalf of defendants Birdsall and Marron.

To which ruling the defendants duly and regularly excepted.

XIII.

The Court erred in admitting into evidence over the objection of the defendants the testimony of Stephen V. Keveney, with reference as to what occurred at 1249 Polk Street during the months of June or July, 1923. The full substance of the evidence is more fully set out in the following extracts from the testimony of witness Keveney under direct examination by counsel for the plaintiff:

Q. In June *of* July, 1923, did you ever have occasion to visit 1249 Polk Street?

Mr. O'CONNOR.—That is objected to on the ground it is immaterial, irrelevant and incompetent, and in no way connected with the conspiracy charged in this indictment.

The COURT.—I do not see your point.

Mr. SMITH.—There is no foundation laid for the introduction of this testimony, and we object upon the ground that none of the defendants upon trial here have been shown to have had any connection at the time designated by the Government's attorney.

The COURT.—The objection is overruled.

Mr. SMITH.—Note an exception.

A. I did.

Mr. GILLIS.—Q. Did you purchase any drinks in June, 1923, intoxicating liquor, in that place?

Mr. SMITH.—The same objection.

The COURT.—The same ruling. [487]

Mr. SMITH.—Exception.

A. I did.

Mr. GILLIS.—Q. Whoe did you purchase it from? A. George Hawkins.

Q. What was the kind of liquor that you purchased?

A. I purchased four drinks of whiskey, and a bottle of whiskey.

Q. Did you visit the place in July?

A. I did.

Q. What time in July, do you remember?

A. July 3, 1923.

To which ruling defendants duly and regularly excepted.

Q. Did you purchase any intoxicating liquor there at that time? A. I did.

Q. And from whom? A. George Hawkins.

Q. What was the liquor you purchased?

Mr. SMITH.—Objected to on the ground it has been asked and answered.

The COURT.—This is another occasion.

Mr. GILLIS.—Yes.

Mr. SMITH.—What was the date of the first?

Mr. GILLIS.—In June.

A. Whiskey was purchased on that occasion.

To which said ruling the defendants duly and regularly excepted.

XIV.

The Court erred in overruling the motion of defendants Marron and Birdsall to strike from the

record all of the testimony of witness Keveney, upon the ground that it is immaterial, irrelevant and incompetent, and in no way connected with any of the defendants who are here on trial, this testimony relating to the conduct of the premises known as 1249 Polk Street at a time when several other defendants before the bar are alleged to have been in no way connected with them; to which ruling of the Court said defendants then and there duly and regularly excepted. [488]

XV.

The Court erred in sustaining the objection made by counsel for the defendants to the following question propounded on behalf of defendants Marron and Birdsall:

Mr. SMITH.—Q. Did you make any notes of the incidents that evening, other than the case report that you say that you made out?

A. No.

Q. Was there ever any prosecution based, if you know—

Mr. GILLIS.—Just a moment—

Mr. SMITH.—Let me finish the question.

Mr. GILLIS.—Finish it up.

Mr. SMITH.—Q. Was there ever any prosecution based, if you know, upon the purchase made by you at that time?

Mr. GILLIS.—The record is the best evidence of that, and I object to it on that ground.

Mr. SMITH.—I am asking if he knows.

The COURT.—It does not make any dif-

ference if he knows or not. The record is the best evidence. Sustained.

Mr. SMITH.—Q. Did you ever go to a United States Commissioner for the purpose of securing a search-warrant based upon that purchase?

Mr. GILLIS.—I think that is entirely immaterial and irrelevant.

The COURT.—Sustained.

To which ruling the defendants Marron and Birdsall then and there duly and regularly excepted.

XVI.

The Court erred in refusing to strike from the record the entire testimony of the witness George H. Neary, which testimony is as follows: [489]

CALLED FOR THE UNITED STATES:

Mr. GILLIS.—Q. Your position is what, Mr. Neary? A. Used car business.

Q. You were connected with the Government as a prohibition agent for some time, were you not? A. For 2½ years.

Q. Were you a prohibition agent on May 15, 1924? A. Yes.

Q. On that date did you have any occasion to visit 1249 Polk Street? A. Yes.

Q. Did you go there with a search-warrant?

A. Yes.

Q. What did you find?

A. We found 44 quarters of wine, two gallons of gin, one gallon jug half full of whiskey, three sacks.

Mr. SMITH.—What was the date?

Mr. GILLIS.—May 15, 1924.

upon the ground that the defendant Birdsall had been once in jeopardy as to the matters testified to by Mr. Neary; that in action No. 15,018, defendant Birdsall was charged with violating the National Prohibition Act, pleading guilty to the information in its entirety, judgment was imposed and judgment was wholly set; defendant Birdsall having fully answered to the Government for any infraction of the law of which he might have been guilty, to which order of refusal, defendants Marron and Birdsall then and there duly and regularly excepted.

XVII.

The Court erred in admitting into evidence over the objection of the defendants Marron and Birdsall the following testimony given by Federal Agent Lee:

Mr. GILLIS.—Q. Were you present at that place on October 3, 1924?

The COURT.—That is evidence seized on October 3d?

Mr. SMITH.—Yes.

A. Yes, I was present on the raid of October 3d.

Q. Did you assist [490] in searching the premises at that time? A. I did.

Q. What did you find?

A. Well, we found liquor, but not as much as on the first raid.

Q. Do you know how much you found?

A. Yes, I have a list of it here. Do you want me to read it?

Q. Yes.

A. Two bottles of port wine, one bottle of port wine three-quarters full, one bottle of whiskey, one bottle one-third full of whiskey, one bottle containing two ounces of whiskey one bottle three-quarters full of brandy, one bottle half full of Scotch whiskey, one bottle one-third full of Vermuth, two bottles of gin, one one-gallon bottle three-quarters full of gin, one bottle of Bocarde rum, one bottle of Bocarde rum, nearly full, two sacks of Canadian beer. That was all, I guess; that is all I have.

The COURT.—Had you cleaned out the place on the 2d of October? A. Yes.

Q. You found this liquor on the 3d?

A. We found this the next day. *A.* We arrested a defendant by the name of Charles Clark, who afterwards proved to be Mahoney.

Q. Is that a defendant in this case?

A. Yes; he gave the name of Charles Clark at the time of arrest.

Mr. GILLIS.—You may cross-examine.

Mr. O'CONNOR.—Q. After you arrested the defendant who gave the name of Charles Clark, what did you do with him?

A. He was booked at the Bush Street police station.

Q. Did you leave him there at the Bush Street police station? A. Yes.

Q. What charge did you book him under?

A. National prohibition.

Q. Violation of the National Prohibition Act? A. Yes.

Mr. GREEN.—Q. Whom did you arrest on the raid of October 2? A. George Birdsall. [491]

Mr. O'CONNOR.—That is all.

Mr. GREEN.—That is all.

the basis of the objection on the part of defendant Marron being that said evidence was obtained under the execution of a search-warrant that had been improperly issued, i. e., without probable cause having been first shown to exist for its issuance. That upon defendant Birdsall's petition for the suppression of the evidence thus obtained, the Court granted the motion of defendant Birdsall, but denied it as to the defendant Marron, to which ruling of the Court the defendants then and there duly and regularly excepted.

XVIII.

The Court erred in admitting into evidence over the objection of the defendants Marron and Birdsall the following testimony:

Mr. GILLIS.—Q. Mr. Whittier, were you present at 1249 Polk Street on October 3, 1924?

A. I was.

Mr. GILLIS.—Q. What did you find in the way of liquor, if anything?

A. Two bottles of port wine, one bottle of port wine three-quarters full, one bottle of whiskey, one bottle one-third full of whiskey,

one bottle containing two ounces of whiskey, a bottle three-quarters full of brandy, one bottle one-half full of Scotch whiskey, one bottle one-third full of vermuth, two bottles of gin, one one-gallon bottle three-quarters full of gin, one bottle of Bacardi rum, one bottle Bacardi rum nearly full, two sacks of Canadian beer.

Q. I show you bottle numbered 27,999, and ask you if that is one of the bottles that you secured at that time at that place? A. Yes.

Q. Was that delivered to the United States Chemist? A. It was.

Mr. GILLIS.—I ask that that be introduced for identification. [492]

(The bottle was marked "U. S. Exhibit 9 for Identification.")

Q. And was that delivered to the United States Chemist? A. Yes.

Mr. GILLIS.—I ask that that be introduced for the purpose of identification.

(The bottle was marked "U. S. Exhibit 10 for Identification.")

Q. I show you bottle 28,001 and ask you if that was taken from that place that time?

A. Yes.

Q. And was that delivered to the United States chemist? A. It was.

Mr. GILLIS.—I ask that that be introduced for identification.

(The bottle was marked "U. S. Exhibit 11 for identification.")

Q. I show you bottle numbered 28,002, and

ask you if you secured that at that time at that place? A. I did.

Q. You delivered that to the United States chemist, did you? A. Yes.

Mr. GILLIS.—I ask that that be introduced for the purpose of identification.

(The bottle was marked "U. S. Exhibit 12.")

Q. I show you bottle 28,003, and ask you if that was secured at that time at that place?

A. Yes.

Q. Was that delivered to the United States chemist? A. Yes, it was.

Mr. GILLIS.—I ask that that be introduced for the purpose of identification.

(The bottle was marked "U. S. Exhibit 13 for Identification.")

Q. I show you bottle 28,004, and ask you if that was secured at that time at that place?

A. Yes.

Q. And you delivered that to the United States chemist? A. Yes.

the basis of the objection on the part of defendant Marron being that said evidence was obtained upon the execution of a search-warrant that had been improperly issued, i. e., without probable cause having been first shown to exist for its issuance. That [493] upon defendant's Birdsall petition for the suppression of the evidence thus obtained the Court granted the motion of defendant Birdsall, but denied it as to the defendant

Marron, to which ruling the defendants then and there duly and regularly excepted.

XIX.

The Court erred in admitting into evidence over the objection of the defendants Marron and Birdsall the following testimony of Agent Whittier in the document marked as U. S. Exhibit No. 16:

Mr. GILLIS.—Q. I show you another piece of paper, Mr. Whittier, and ask you to examine that without comment.

Mr. O'CONNOR.—The same objection as to the defendant Mahoney.

Mr. GILLIS.—Q. Do you recognize that, Mr. Whittier? A. I do.

Q. Where did you get that?

A. The same room.

Q. You mean by that at 1249 Polk Street?

A. 1249 Polk Street.

Q. On October 3d? A. On October 3d.

Mr. GILLIS.—I ask that that be introduced for the purpose of identification.

(The document was marked "U. S. Exhibit 15 for Identification.")

The grounds urged in opposition to the introduction of evidence was as follows:

Mr. O'CONNOR.—Objected to on behalf of the defendant Mahoney as irrelevant, immaterial and incompetent, and no foundation laid for its introduction in evidence.

Mr. SMITH.—As far as the defendants Marron and Birdsall are concerned, we will object to its introduction upon the ground

that no foundation has been laid, that there is no identification of the particular instrument, that there is nothing to show that what appears on it is authentic, or that it represents any particular thing in connection with this particular case, and, in addition thereto, it is not one of the things that was authorized to be seized by virtue of the search-warrant that was issued on that date, and was seized in excess of authority. [494]

to which ruling of the Court the defendants duly and regularly excepted.

XX.

The Court erred in admitting into evidence over the objection of the defendants Marron and Birdsall the following testimony and documents:

Mr. GILLIS.—I ask that that be introduced in evidence and marked "U. S. Exhibit 16."

Mr. GILLIS.—I show you five small slips of paper and ask you to look at them without comment.

Mr. GILLIS.—Q. Do you recognize these, Mr. Whittier? A. I do.

Q. Where did you get these?

A. Out of the book.

Q. When you refer to the book, you mean the gray book, Government's Exhibit 3?

A. That is it.

Q. And they were in this book when you first saw them? A. Yes.

Mr. GILLIS.—I ask that these be introduced in evidence and marked "U. S. Exhibit 17."

(The documents were marked "U. S. Exhibit 17.")

Mr. GILLIS.—Q. When you have referred to the gray book in your previous testimony, Mr. Whittier, you refer to this book that I have now in my hand, Government's Exhibit 3?

A. Yes.

the grounds urged in opposition to the introduction of evidence being the same as urged in the preceding assignment of error, and to which ruling defendants duly and regularly excepted.

XXI.

The Court erred in sustaining the objection interposed by the plaintiff to the following question propounded to the witness Whittier on his cross-examination:

Mr. SMITH.—Q. Mr. Whittier, you are the Agent Whittier who executed the search-warrant on October 2, 1924, at these premises?

A. Yes.

Q. And you are the agent who executed the search-warrant [495] on these premises on October 3d? A. Yes.

Q. Did you know of your own knowledge that there had been any violation of the law there subsequent to the first raid?

The witness Whittier executed the search-warrant on 1249 Polk Street on both occasions, i. e., October 2, 1924, and October 3, 1924. The question asked indicated that on behalf of the defendants Marron and Birdsall counsel attempted to show that there was no probable cause for the

issuance of the warrant which was executed on the 3d of October, 1924; to which ruling defendants then and there duly and regularly excepted.

XXII.

The Court erred in admitting over the objection of the defendants Marron and Birdsall the following testimony:

Q. Where did you go?

A. 3047 Sacramento Street.

A. Sacramento, or California?

A. California.

Q. Do you know who lived there?

A. The premises were occupied by a man named William F. Curran.

Q. What did you find or see when you arrived there?

Mr. O'CONNOR.—Exception.

The COURT.—You may answer.

A. I found a large quantity of liquor contained in the garage underneath his residence.

Mr. GILLIS.—Q. Have you a list of the liquor that you seized?

The COURT.—The objection will be overruled. I assume that this will be connected in some way with the defendants.

A. In the garage at this time were 398 sacks containing what we presumed to be beer, 21 sacks presumed to contain whiskey, 7 sacks of whiskey partly filled, 11 cases of whiskey, three cases of champagne, three cases of champagne partly filled, two barrels of wine, one barrel of wine part full— [496]

A. Shall I continue with a description of the property taken?

Mr. GILLIS.—Yes.

A. Two barrels of brandy, two part-full barrels of brandy, one 50-gallon tank of alcohol, one 5-gallon jug of wine part full, two 20-gallon stills, and an empty barrel.

Mr. GILLIS.—Q. Did you seize the liquor at that time?

A. No, we entered the premises for the purpose of making a sanitary inspection; when we found that the liquor was contained therein we called the Federal Prohibition Agents Shurtleff and William F. Gwynn—no, Federal Agent Shurtleff and William F. Gwynn was the owner of the premises. He admitted us to the runway, from which position we could observe the contents of the garage.

The COURT.—That is, Mr. Gwynn admitted you there, you mean?

A. Yes, into the alleyway. He admitted us for the purpose of making the sanitary inspection.

Mr. GILLIS.—Was that Mr. Gwynn the agent or the owner of the property?

A. He is the owner of the property.

Q. You said a moment ago Curran was.

A. I will have to go back on that. The Federal Agents were A. R. Shurtleff and William F. Gwynn. The owner of the property was William Curran; he admitted us.

Q. Now, I will ask you Captain Coulter, if

on September 2, 1924, you had occasion to communicate with the prohibition department of this city, the National Prohibition forces?

A. On what date?

Q. On September 2d. A. No, I did not.

Q. What date did you, on or about that time?

A. September 3d.

Q. On September 3d? A. Yes, 1924.

Q. What was the occasion of your communicating with the Prohibition Department at that time? A. On September 2d—

Q. (Intg.) Without stating any conversation between yourself and your officers.

A. On September 2d, about 7:20 P. M., I was [497] attending a meeting of the Board of Police Commissioners at the Hall of Justice, when I was communicated with by one of the officers of my company, who informed me that he had been informed by—

Mr. GILLIS.—Q. Without stating what the information was, you received certain information from one of the officers of your company? A. Yes.

Q. Did you issue any orders upon that report from your officer? A. I did.

A. What were those orders?

Mr. O'CONNOR.—I object to that on the ground it is hearsay and not binding upon any of these defendants.

The COURT.—You can state it generally; objection overruled.

Mr. O'CONNOR.—Exception.

Mr. GILLIS.—Q. You were acting in your official capacity as a captain of police in charge of that district at that time?

Mr. O'CONNOR.—That is objected to on the ground it is leading and suggestive.

The COURT.—Overruled.

Mr. O'CONNOR.—Exception.

Mr. GILLIS.—Q. Now, I will ask what orders were issued by you?

A. I communicated with the platoon commander at the Western Addition station, and ordered him to blockade these premises and to permit nothing to be taken in or out of the same until the following morning.

Mr. GILLIS.—Q. What premises were those? A. 2922 Sacramento Street,

The COURT.—This was a different place from the one you spoke of before? A. Yes.

Mr. GILLIS.—Q. Now, on September 3, did you communicate with the Prohibition Department of this city?

A. Yes, I notified Federal Agent Rinckel.

Q. Did you go to 2922 Sacramento Street?

A. No, I did not.

Mr. GILLIS.—That is all. [498]

the objections of Marron and Birdsall being based upon the fact that all evidence obtained from the witness Coulter was obtained from the witness Coulter by reason of an unlawful search and seizure while acting in conjunction with Federal Prohibition Agents as shown by the testimony of Captain Coulter when he referred to Federal Chief

Field Agent Paget when undergoing cross-examination by counsel for Marron and Birdsall, which is as follows:

A. He said, "Well, I am very glad to cooperate with you, I will send out a couple of men." I said, "That is all *was* want."

Mr. SMITH.—Q. Captain Coulter, after the arrival of the prohibition officers on the scene—you say they arrived on the scene about the same time as you? A. Yes.

Q. What was said by the officers to you, and what did you say to them, and what was done by them?

A. Well, upon their entrance to the garage, we looked over the property contained therein, and I advised them that we had no further jurisdiction in the matter, that the seizure of the liquor was strictly up to them, but I would leave an officer there to take a memorandum for my information, showing what was taken out of that garage that day; that report was submitted to me by one of the officers, the report of which I have given to you.

Q. Then, with reference to the seizure of this property you had nothing to do, other than what you have stated? A. That is all.

Q. The entire seizure was made by the prohibition officers: Is that correct? A. Yes.

Mr. GILLIS.—I object to that as calling for the conclusion of the witness. Let the facts speak for themselves.

The COURT.—I suppose that calls for a fact. He is asking him, in effect, what was done with regard to taking the liquor. [499] I will allow the question.

Mr. SMITH.—Q. You never at any time took this liquor into your custody, did you?

A. What is that?

Q. You never at any time took this liquor into your custody, did you? A. No.

Q. You never exercised any control over it?

A. None whatever.

Q. Mr. Paget remarked, as you say, that he was very glad that you were co-operating with him?

A. He would be very glad to co-operate with me in the matter.

Q. Thereafter, whatever was done was done by the prohibition agents? A. Everything.

to which ruling the defendants duly and regularly excepted.

XXIII.

The Court erred in refusing to strike from the record all of the testimony given by witness Coulter for the reasons set forth in the foregoing assignment of errors, to which ruling of the Court the defendants then and there duly and regularly excepted.

XXIV.

The Court erred in overruling the objection interposed by the defendants to the following question propounded to the witness Vaughan:

Mr. GILLIS.—I show you Government Exhibit No. 3 and ask you to just glance at that and see if you recognize it without any comment.

Mr. SMITH.—We will object to all of the testimony of this witness on the ground that it is improper under the Gouled case decision, which goes directly to the point I am making now, i. e., a man's records cannot be used against him in a criminal proceeding, any more than he could be compelled to testify against himself [500] because in either event he would be an unwilling source of evidence as against himself.

The COURT.—Overruled.

Mr. SMITH.—Note an exception.

Mr. SMITH.—We will object to all of this testimony on the ground that it is improper under the Goulet decision; the Goulet case goes directly to the point that I am making now, that is a man's records cannot be used against him in a criminal proceeding any more than he could be compelled to testify against himself, because in either event he would be the unwilling source of evidence as against himself. The Supreme Court has passed directly upon that point, and I respectfully urge it at this time.

The COURT.—Overruled.

Mr. SMITH.—Note an exception.

Mr. GILLIS.—Q. Do you recognize this book? A. Yes, I do.

Q. I will show you a sheet of paper and ask you if you recognize that, Mr. Vaughan, Government's Exhibit 16. A. Yes.

Q. No, Government's Exhibit 16, do you know whose handwriting that is, Mr. Vaughan?

A. Yes, that is mine.

Mr. SMITH.—That is objected to upon the ground it is immaterial, irrelevant and incompetent.

The COURT.—Overruled.

Mr. GILLIS.—If you know? Do you know? A. Yes.

Q. Whose handwriting is it?

A. My own.

Q. You made that summary, did you, Mr. Vaughan? A. Yes.

Mr. GILLIS.—Q. From what was that Government's Exhibit 16 made, Mr. Vaughan?

A. From this book here.

Q. From Government's Exhibit 3?

A. Yes, the book.

Q. Now, can you look at that book and say when you first began keeping the account or keeping the summary?

A. I will say about [501] the early part of March. The February totals are my figures.

Q. The February totals are your figures?

A. Yes.

Q. From that time on until the end of September, until the September statement was

made up, did you make the summary from the book each month?

A. I think so, yes.

Q. I notice the first item here on page 86 is June, at the top of the page "Vaughan": That is your name? A. Yes.

Q. $10? A. Yes.

Q. That item was made by you? A. Yes.

Q. That was your monthly charge for making these up? A. Yes.

Q. If you will, turn to page 81, please, Mr. Vaughan. Calling your attention to three cross-marks on page 81, opposite which are the figures $170, will you explain to the jury the significance or the meaning of those three cross-marks?

Mr. SMITH.—Just a second. Where are the cross-marks you have reference to?

Mr. GILLIS.—There, Mr. Smith.

Mr. SMITH.—We will object to the question upon the ground that it is assuming something that is not in evidence, and, furthermore, that this witness has not heretofore testified that the cross-marks signify anything.

The COURT.—Q. Do you know what they signify?

A. There are certain items here that—

Mr. GILLIS.—Just answer the Court's question: Do you know what they signify?

A. I know the items, but I don't know exactly what the payments represent.

Q. Do you know what go to make up the

figures that are opposite those three cross-marks?

A. Yes, the items I can pick out here.

The COURT.—He may answer.

Mr. GILLIS.—Q. What are the items that went to make up the $170 opposite the three cross-marks? [502]

The COURT.—Let me see that. Which ones do you refer to?

Mr. GILLIS.—These.

The COURT.—Q. Is this your own summary, in your handwriting? A. Yes.

Mr. GILLIS.—Q. That is your own summary? A. Yes.

The COURT.—You may explain what the three cross-marks mean.

A. They are items marked here, "Kissane" and "Police" items, these items.

Q. Kissane and Police? A. Yes.

Q. Did you have any instructions from Mr. Birdsall with reference to making up that particular item? A. Why, I think I did, yes.

Q. What were those instructions?

A. Well, to make them up in one total, as I have shown them here.

Q. What was to go in that total?

A. Just those items marked "Police," "Kissane," and "Gift," or something of that character.

Q. "Police," "Kissane," and "Gift"?

A. Yes.

The COURT.—Q. Did he tell you why to put down just simply crosses instead of what the items really were?

A. No, I do not recall any specific instructions. He said just to show these items separately, but I do not recall now any instructions.

Mr. GILLIS.—Q. Now, calling your attention to the same Exhibit 3, page 87, the summary on that page, Mr. Vaughan, is in your handwriting? A. Yes.

Q. Those three cross-marks with the figures $195 are in your handwriting? A. Yes.

Q. Can you tell from the book what items in the month of June accounts *when* to make up the $195? A. Well, the same items.

Q. The same items? A. Yes.

Q. Calling your attention to page 94 for the month of July, 1924, that summary on that page is in your handwriting? A. Yes. [503]

Q. And the four cross-marks with the $180 opposite is made up of the same items, Kissane, Police, and Gifts? A. Yes.

Q. Calling your attention to page 101, that summary on that page being for August, 1924, is in your handwriting? A. Yes.

Q. And the three cross-marks with the $180 opposite that figure are made up from the items, Kissane, Gifts and Police? A. Yes.

Q. And on page 107 that summary is made up in your handwriting? A. Yes.

Q. And the five cross-marks with the figures $170 opposite, for the month of September,

1924, that figure is made up from the total of the three items, Kissane, Police and Gifts, for the month of September? A. Yes.

Q. Now, this Government Exhibit 16, just what does that represent, Mr. Vaughan, what is it a statement of?

A. From the books for the month of September, the totals.

Q. Is that a profit or loss statement?

A. Yes, it is intended for that.

Q. For the business that was carried on there, according to the book, for the month of September? A. Yes.

Q. 1924? A. Yes.

Q. Now, I call your attention, Mr. Vaughan, to pages 80 and 81, at the top of page 80 under date of May 19, 1924, I call your attention to the item, "Gov. fine $500"; then on the opposite page 81 there is written "½ fine, $250." Is that in your handwriting? A. Yes.

Q. Will you tell me what that indicates?

A. One-half of the item shown over here, the $500.

Q. One-half of the item of $500 that I have just read on page 80? A. Yes.

Q. And is that chargeable to some individual?

A. Yes, it appears [504] that way.

Q. Who was it chargeable to?

A. To Birdsall. It says, "Bird"; I presume it was Birdsall.

The COURT.—What was that $500 for?

A. Well, it says there "Gov. Fine."

The COURT.—What is "Gov."?

Mr. GILLIS.—It stands go—

Mr. SMITH.—Just a second, we will object to that.

The COURT.—Do you know?

Mr. GILLIS.—It is very plain what it stands for. I will let your Honor look at it.

The COURT.—Where is "Gov. Fine"?

A. Up at the top of the page.

Mr. GILLIS.—Q. Now, what time of the month did you usually go there to make up these books, Mr. Vaughan?

A. Well, the 1st, or as soon after as I could —I think it was around the 1st.

Q. Who did you see when you went there?

A. Well, I think I usually saw Birdsall there.

Q. Did you talk with him occasionally about the making up of the different items in the book?

A. Well, I don't know of any conversation we had after I once got started; I usually just went ahead the same as the preceding month.

Q. Did you ever see Mr. Eddie Marron there?

A. Yes.

Q. Where did you go there in the flat, what part of the flat did you go into when you made the summary?

A. Usually in the front room, there.

Q. Did Mr. Birdsall and Mr. Marron go in with you there?

A. Occasionally I would say they had been in the room when I was working on it, maybe not

continuously; probably there were times when they were not present.

Q. Occasionally one would be present and sometimes both of them? [505] A. Yes.

Q. That went on up to the time that you made the last statement for the month of September? A. Yes.

Q. When you first went there, Mr. Vaughan, who gave you this book?

A. Well, I don't know; I presume Birdsall handed it to me when I first started in.

Q. Was he the first man that you took it up with with reference to keeping the books?

A. Yes.

Q. You received your instructions from him at that time with regard to the salary you were to receive and what you were to do? A. Yes.

Q. Look at Government's Exhibit 16, which is the September profit and loss statement, Mr. Vaughan. I would like the jury to get a view of this at the same time. You have got an item there, "Slot machine, $254."

Mr. SMITH.—Just a second. We will object to that on the ground it is purely immaterial, irrelevant, and incompetent. The defendants here are not charged, or any of them charged with maintaining slot machines, and I assume that the question is simply asked for the purpose of prejudicing the jury in the consideration of the evidence.

Mr. GILLIS.—I will say it is not, Mr. Smith.

Mr. SMITH.—We will object to it on the ground it is highly improper.

The COURT.—It shows the relations between these parties, I do not think the jury is going to convict these men of conspiracy because they had slot machines there, but the financial arrangements, division of the money, are all matters to be considered in connection with the charge that they conspired. I will overrule the objection.

Mr. SMITH.—Note an exception.

Mr. GILLIS.—Q. Where did you get the items to make up the figure $254, Mr. Vaughan?

A. Isn't it in the book, there?

Q. Glance back and see. A. There it is.

Q. You received that from page 106, which would be the summary [506] for September. A. Yes, September.

Q. Now, I call your attention to an item of "salaries $840." Do those salaries appear in that book, or were you given that amount.

A. I will look in the book, I don't recall all the details. Here is part of it. As I recall it, $20 a day was charged for Birdsall.

Mr. SMITH.—I will ask that that go out as being immaterial, irrelevant and incompetent, and not responsive to the question. He was asked about a particular item. Will you read the question, Mr. Reporter.

The COURT.—I remember the question. He was asked what went to make up the item

of salaries, and the answer was $20 a day was paid to Mr. Birdsall. The motion is denied.

Mr. SMITH.—Exception.

A. (Continuing.) And this item marked "Charles, $240," makes $840.

Mr. GILLIS.—Q. Who was Charles?

Mr. O'CONNOR.—If he knows.

Mr. GILLIS.—Q. If you know.

A. There was a fellow there by the name of Charles, and I presume it was paid to him.

Mr. O'CONNOR.—I ask that his presumption go out.

Mr. GILLIS.—Q. Did you know any other employee there on the premises, Mr. Vaughan?

A. Did I know any?

Q. Yes. A. This fellow Charles.

Q. Did you know him?

A. Well, I met him there.

Q. Did you know his last name? A. Yes.

Q. What was his last name?

A. Mahoney.

Q. Does the word Charles refer to that individual, if you know?

Mr. O'CONNOR.—That has been asked and answered.

A. As I said before, I presume so, but I did not see the money paid, or anything like that.

Q. Do you know if there were any other employees there except Mr. Mahoney?

A. Nobody else that I know of. [507]

Q. Now we drop down, Mr. Vaughan, to the two letters here, "E. M.," with the

figures "600" opposite them. Do you know what these two letters "E. M." refer to?

A. Yes, E. Marron.

Q. And the $600?

A. That was his payment there for September, the amount he received in September.

Q. Now, we drop down below and we find "E. M. Proportion $293.55, G. B. proportion $293.55"; do you know what the latter "E. M." refers to? A. E. Marron.

Q. And "G. B."? A. G. Birdsall.

Q. And what do those two items refer to or represent?

A. That shows the balance there of $587.10 after charging off the $600, taking that away from it, and then that was divided up equally.

Q. Did you receive any instructions from anyone there with reference to the manner in which these figures should be set down and deducted? A. Yes.

Q. Who gave you those instructions?

A. Mr. Birdsall.

Q. What did he say with reference to the $600, as to when or where it was to be taken out?

A. After the expenses had been deducted from the receipts, then that amount should be deducted and the balance divided between them.

Q. Do I understand that from the net proceeds the defendant Marron was to receive $600 and after that $600 had been deducted

that the balance was to be divided equally between Eddie Marron and George Birdsall—

Mr. SMITH.—Just a second.

Mr. GILLIS.—Q. (Continuing.) Is that correct?

Mr. SMITH.—Have you finished?

Mr. GILLIS.—Yes.

Mr. SMITH.—We will object to that on the ground that it is leading and suggestive.

The COURT.—Overruled. [508]

Mr. SMITH.—I submit, may it please the Court, that Mr. Gillis says he understands. Let us have what the witness understands.

The COURT.—The objection is overruled.

Mr. SMITH.—Note an exception.

A. That was my understanding. That is the reason I did it in that manner.

The COURT.—Were you directed to make up the account in that way? A. Yes.

Mr. GILLIS.—Q. Mr. Vaughan, will you look at the bottom of page 69, an item there mentioned, "New Police $90"; that is in your handwriting, is it? A. Yes.

Mr. SMITH.—What is the item referred to?

Mr. GILLIS.—"New Police, $90."

Mr. SMITH.—I cannot agree with you that that is what it says there. It looks to me like "New Policy."

Mr. GILLIS.—Q. Did someone give you instructions with reference to putting that in there, Mr. Vaughan?

A. They must have, otherwise I would not have written it, not knowing anything about any payment of any kind.

Q. Do you know who gave you those instructions?

A. Well, I can say Mr. Birdsall, although I do not recall the incident just now.

Q. That is the best of your recollection?

A. Yes.

The COURT.—Is it "New Police," or "New Policy"? A. It looks like "Policy" here.

Q. Do you remember?

A. I do not recall the item, no.

Mr. GILLIS.—Q. Do you recall the incident at all?

A. No, nothing about it, nothing in my mind now on it, it is my writing, but I do not recall writing it there, that is, any [509] special incident connected with it.

Q. You have no recollection as to what that particular item is?

Mr. O'CONNOR.—Objected to on the ground it has been asked and answered.

The COURT.—I will let him answer again. You may answer.

Mr. O'CONNOR.—Exception.

A. No, I do not recall.

Mr. GILLIS.—Q. Now, do you remember, Mr. Vaughan, about the first time that you went into that place, 1249 Polk Street?

A. Do I remember about the first time?

Q. About the first time you went in there.

A. From the books, the only recollection I have here, I see my figures at the end of February.

Q. Before you took up the matter of keeping the books with Mr. Birdsall, had you gone into that place?

Mr. SMITH.—That is objectionable on the ground it is immaterial, irrelevant and incompetent.

The COURT.—The objection is overruled.

Mr. SMITH.—Exception.

A. I do not recall now whether I had or not.

to which ruling of the Court said defendants then and there duly and regularly excepted.

XXV.

The Court erred in admitting in evidence over the objection of the defendants the following statement or document, to wit: U. S. Exhibit No. 15, testified to by witness Coleman, entitled "a receipt of the Water Company stamped by perforated stamps—September 5th, 1924, under the name of Eddie Marron," taken from the Water Company:

Mr. SMITH.—We will object to its introduction on the ground it is immaterial, irrelevant and incompetent and no [510] proper foundation has been laid for its introduction.

The COURT.—Overruled.

Mr. SMITH.—Exception.

to which exception defendants then and there duly and regularly excepted.

XXVI.

The Court erred in admitting in evidence over

the objection of the defendants the following statement or document, to wit: U. S. Exhibit No. 18, and entitled, Affidavit of Candidate, Eddie *Matton:*

Mr. SMITH.—We will object it is immaterial, irrelevant and incompetent and no foundation laid.

The COURT.—Overruled.

Mr. SMITH.—Note an exception.

to which said ruling the defendants duly and regularly excepted.

XXVII.

The Court erred in admitting in evidence over the objection of the defendants the following statement or document to wit: U. S. Exhibit No. 19, being a statement of telephone charges effective November 21, 1923, to October 20, 1924, and the service application.

Mr. SMITH.—I object on the ground that it is immaterial, irrelevant and incompetent and no foundation laid for its introduction.

The COURT.—The objection is overruled.

Mr. SMITH.—Exception.

to which ruling defendants duly and regularly excepted.

XXVIII.

The Court erred in admitting in evidence over the objection of the defendants U. S. Exhibit No. 14 for Identification, being [511] a statement or document showing telephone bill, Ed Marron, 1249 Polk Street:

Mr. SMITH.—Objected to on the ground it is immaterial, irrelevant and incompetent and no proper foundation has been laid.

The COURT.—Overruled.

Mr. SMITH.—Exception.

to which ruling defendants duly and regularly excepted.

Mr. GILLIS.—Q. What is it?

A. A telephone bill payment.

Q. One of the regular telephone company bills?

A. Not exactly, no; it is a duplicate issued in case the original was lost.

Q. What I mean by that is, that it is a bill from the telephone company? A. It is.

Q. It is one of the telephone company's regular instruments that they send out? A. Yes.

to which ruling defendants duly and regularly excepted.

XXIX.

The Court erred in admitting into evidence over the objection of the defendants the following statement or document, to wit: United States Exhibit No. 21, being a statement of account of the Bank of Italy. The full substance of the evidence thus admitted is set out in the following extract from the testimony of the witness Bell under direct examination by counsel for the plaintiff:

Mr. SMITH.—To which we object on the ground it is immaterial, irrelevant, incompetent, no foundation has been laid for its introduction; furthermore, that the introduction

of that instrument violates the constitutional guarantees of the defendant Marron, in that defendant is compelled to be the unlawful source of information against himself.

The COURT.—Overruled.

Mr. SMITH.—Note an exception. [512]

Mr. GILLIS.—Q. Can you tell from that record, Mr. Bell, the length of time that that joint account was kept at your bank? A. Yes.

Q. Will you state what that is?

A. The account was opened on September 4, 1923, and was closed on November 14th of the same year.

Q. November when? A. November 14th.

Q. Is there anything on there to indicate at all who could draw money out of the bank, or how many signatures were needed to draw money out of the bank?

Mr. SMITH.—Just a second; we will object to that on the ground it is immaterial, irrelevant and incompetent, not the best evidence, that the instrument will speak for itself.

Mr. GILLIS.—Withdraw the question.

Q. Calling your attention, Mr. Bell, to the heavy typing at the top of the page "Two signatures required," what does that signify?

Mr. SMITH.—To which we will object on the ground that it is immaterial irrelevant and incompetent, and no bearing upon the issues in this case.

The COURT.—

Mr. SMITH.—Exception.

A. Those are the instructions to the bookkeeper that both signatures are required to draw against the account.

Mr. GILLIS.—Q. By that do you mean the signature of Marron and—

A. (Intg.) Brand.

Q. Brand? A. Yes.

Mr. GILLIS.—No further questions.

Mr. SMITH.—No questions. Now, I will ask that the entire testimony be stricken from the record on the ground that it is immaterial, irrelevant and incompetent. [513]

The COURT.—Motion denied.

Mr. SMITH.—That the testimony does not show that the defendants, any of the defendants in this action are in any way connected with this account.

The COURT.—Motion denied.

Mr. SMITH.—Note an exception.

to which defendant duly and regularly excepted.

XXX.

The Court erred in admitting in evidence over the objection of the defendants the testimony of witness Hicks; the full substance thus admitted is set out in the following extract from the testimony of witness Hicks under the direct examination by counsel for plaintiff:

XXXIX.

The Court erred in admitting into evidence, over the objection of the defendants, the following statement given by the witness Kissane, under cross-examination:

Mr. GILLIS.—Q. When you talked to Birdsall and he said that he lived there, did you believe that he lived there then?

Mr. SMITH.—That is calling for the conclusion and opinion of the witness, and is objected to on that ground.

The COURT.—Overruled.

Mr. SMITH.—Note an exception.

A. I really did not know whether he was living there or not.

Mr. GILLIS.—Q. What did you believe about it?

Mr. SMITH.—That is objected to on the same grounds.

Mr. GILLIS.—Q. What did you think about it?

The COURT.—Same ruling.

Mr. SMITH.—Exception. [514]

A. I don't know what I did think about it. To tell you the truth about it, I think I thought that he was not living there.

Mr. SMITH.—He thought he was not living there, I ask that that go out.

Mr. GILLIS.—Q. You thought that he was not?

A. I thought he was not. I didn't know that he was there or not, because I was never there at night-time.

Q. Did you believe him when he said he lived there?

A. I don't know whether I did or not; I would not say.

Q. When he said that he lived there, did you believe what he said?

A. No, I don't think I did believe him.

to which ruling the defendants then and there duly and regularly excepted.

XL.

The Court erred in admitting into evidence over the objection of the defendants the following statement given by the witness Kissane as follows:

Q. Now, did you draw any conclusion, or had you drawn any conclusion at that time, as to what kind of a business was being conducted there?

Mr. SMITH.—That is objected to on the very ground indicated by the question itself.

The COURT.—Overruled.

Mr. SMITH.—Exception.

A. Of course, it was a suspected place of bootlegging, and that is the reason I was visiting it.

Mr. GILLIS.—Q. Suspected of bootlegging, but did you draw any conclusion as to what kind of business they were conducting there, if any?

Mr. SMITH.—The same objection. [515]

Mr. GILLIS.—Q. Was it your conclusion that it was a bootlegging business there, or that it was a soft-drink parlor, or something of that nature?

A. I thought they were bootlegging, that was all there was to it.

to which ruling the said defendants then and there duly and regularly excepted.

XLI.

The Court erred in admitting into evidence over the objection of the defendants the following statement by the witness Kissane:

> Q. Now, when you went in there and saw Birdsall in there for the first time, you knew that Birdsall had been a bartender, did you not?
>
> Mr. SMITH.—Just a second; we will object to that on the ground it is immaterial, irrelevant and incompetent, and there is nothing in this record to show that Mr. Birdsall was a bartender, and not involved in the issues, whether he was a bartender or not; and I ask that the question be stricken from the record.
>
> The COURT.—The motion is denied and overruled.
>
> Mr. SMITH.—Note an exception.
>
> A. Yes, I did.
>
> Mr. GILLIS.—Q. You knew that was his principal business, didn't you? A. Yes.
>
> Q. And had been for a great many years?
>
> Mr. SMITH.—I will object to that on the ground that it is immaterial, irrelevant and incompetent, and has no bearing on the issues of this case what he had been doing for a number of years; we are only concerned with what happened from May, 1923, the period covered by this indictment.

Mr. GILLIS.—I am asking if he had that knowledge of this man [516] at that time.

The COURT.—Overruled.

Mr. SMITH.—Exception. A. Yes.

Mr. GILLIS.—Q. And that was one of the things that led you to suspect the place as a bootlegging place when you saw him in there, was it not?

Mr. SMITH.—The same objection.

The COURT.—The same ruling.

Mr. SMITH.—Note an exception.

A. Well, I suspected it as a bootlegging place before ever Birdsall came there.

to which ruling the defendants then and there duly and regularly excepted.

XLII.

The Court erred in admitting into evidence over the objection of the defendants the following statement by the witness Gorham during cross-examination:

Q. When you saw Birdsall there—by the way, you have known Birdsall for some time?

A. I have known him for over 20 years.

Q. When you saw him at the head of the stairs, you knew at that time that Birdsall had been a bartender for a great many years, did you not?

Mr. SMITH.—That is objected to on the ground it is immaterial irrelevant and incompetent, and has no bearing on the issues in this case.

The COURT.—Overruled.

A. I had always known Birdsall, either as bartender or saloon man, except there was one time he worked for the gasoline station up on Divisadero Street.

to which ruling the defendants then and there duly and regularly excepted. [517]

XLIII.

The Court erred in admitting into evidence over the objection of the defendants the following statement by the witness Latham:

Mr. GILLIS.—You have already been sworn in this case, Mr. *Lathen.* Mr. Lathem, did you visit 1249 Polk Street, the latter part of September, 1924?

Mr. SMITH.—Just a second, so that we may know what our position is. Is this supposed to be rebuttal, or what?

Mr. GILLIS.—Supposed to be rebuttal.

Mr. SMITH.—Object to it on behalf of the defendant Mahoney, on the ground that the Government cannot produce rebuttal on that.

The COURT.—Overruled.

Mr. SMITH.—On the further ground that it is not proper rebuttal, if the Court please, to show that this man was not there. There is nothing to rebut.

The COURT.—I don't understand that.

Mr. SMITH.—I say that there has been no testimony even tending to show that this witness was not at 1249 Polk, so there is nothing to rebut.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

Mr. GILLIS.—Q. Your answer?

A. I was, yes, sir.

Q. Do you remember about when that was, approximately? A. Sir?

Q. Do you remember approximately when that was?

A. Well, I could not give the exact date; it was around the latter part of September.

Q. What part of the flat did you go into?

A. I went into the rear part of it. [518]

Q. The kitchen? A. Yes, sir.

Mr. SMITH.—So that the record may show the entire matter without further objection, may our objection run to all this testimony?

The COURT.—No, I don't think so. I don't know what will be developed. You make your objections, and the Court will rule.

Mr. GILLIS.—Q. Who did you see in the kitchen?

Mr. SMITH.—Objected to as improper rebuttal.

The COURT.—Overruled.

Mr. SMITH.—Also as incompetent, irrelevant and immaterial.

The COURT.—Overruled.

Mr. KELLY.—The same objection.

The COURT.—Overruled.

Mr. SMITH.—Exception.

Mr. KELLY.—Exception.

Mr. GILLIS.—Q. At that time who did you see in the kitchen?

A. I saw that gentleman over there. I do not know his name.

Q. Can you point out, as they sit there?

A. That one sitting next to Kissane, on this side.

Q. On this side? A. Yes, sir.

Q. That would be the side nearer the Judge's bench? A. Yes, sir.

Q. Among the defendants?

The COURT.—Who is that?

Mr. GILLIS.—Let the record show that that is Mahoney.

The COURT.—That is correct?

Mr. SMITH.—That is correct.

Mr. GILLIS.—Q. What other defendants did you see there at [519] that time?

A. While I was in there, that gentleman sitting on the other side of Mr. Kissane came in.

Q. That is the side nearer the door?

A. Yes, sir.

Mr. GILLIS.—The record may show that that is the defendant Gorham.

The COURT.—That is correct?

Mr. SMITH.—Yes, sir.

Mr. GILLIS.—Q. He came in at that time, did he? A. Yes, sir.

Q. And what was on the table in the kitchen?

A. Well, there was a bottle and some glasses.

Mr. SMITH.—We will object to that as improper rebuttal.

The COURT.—Overruled.

Mr. SMITH.—Note an exception.

Mr. GILLIS.—Did you see any liquor there?

A. I did.

Q. Was there any poured out.

A. I poured out some, myself.

Q. What was it? A. Gin.

Q. Poured out of a regular gin bottle?

A. Yes, sir.

Q. What was the defendant Mahoney doing?

A. He just came in and walked around. He didn't do anything that I could definitely state.

Q. Did Gorham have any conversation with him?

A. Well, they did, but I didn't pay any attention to what they said.

Q. You don't remember what they said?

A. I don't; I was disinterested in what was going on. I was there for the purpose of getting a drink, and I went out.

to which ruling the defendants then and there duly and regularly excepted. [520]

XLIV.

The Court erred in admitting into evidence over the objection of the defendants the following statement by the witness Latham:

Q. Now, did you notice whether or not there was a cash register in the kitchen?

Mr. SMITH.—Objected to as incompetent rebuttal.

The COURT.—Overruled.

Mr. SMITH.—Note an exception.

A. There was a cash register in there.

Mr. GILLIS.—Q. Did you see any slot machines when you were in there at that time?

Mr. SMITH.—The same objection.

The COURT.—The same ruling.

Mr. SMITH.—Note an exception.

A. I did.

Mr. GILLIS.—Q. Where was that?

A. That was in what I should take to be, had been the dining-room of this flat.

to which ruling the defendants then and there regularly and duly excepted.

XLV.

The Court erred in denying the motion of the attorneys for the defendants for a directed verdict at the conclusion of all the evidence, to which ruling of the Court the defendants then and there duly and regularly excepted.

XLVI.

The Court erred in charging the jury as follows:

Now, gentlemen, evidence has been introduced here of three places other than 1249 Polk Street, one on Sacramento Street, one on California Street, and one *of* Steiner Street. Evidence has been presented to you to the effect that quantities of liquor were found in those three places, and that [521] one of the defendants, Marron, was in charge of and caused that liquor to be stored there. Evidence has been presented to you likewise to the effect that the same kind of liquor which it is alleged was sold at 1249 Polk Street was kept in store at those three other places. It is for you to

determine whether those facts are true. If they are true, and you find that a conspiracy existed, then I instruct you that these would constitute overt acts, and would be binding upon such persons, if any, as you may find were participants in or parties to the conspiracy.

to which ruling the defendants then and there duly and regularly excepted.

XLVII.

The Court erred in charging the jury as follows:

Chronologically speaking, the first one who should be considered by you is the defendant Walter Brand. In determining whether or not he is guilty of conspiracy, you must determine whether or not, from all of the evidence, there was any agreement or combination, of any kind or character, between him and the defendant who is known as Eddie Marron. If you should find from the evidence that all that was done between them was that Mr. Marron loaned the sum of $1,000 to Mr. Brand, without knowledge of the purpose for which it was to be used, and that after Mr. Marron came in there, if you should find he did come in there, that Mr. Brand in no manner participated in the conduct of an unlawful business at 1249 Polk Street, then you must find him not guilty. If, on the other hand, you find that the sum of $1,000 was loaned by Mr. Marron to Mr. Brand for the express purpose and with the knowledge that it was to be used in the purchase or conduct of

a business in violation of the National Prohibition Act, [522] then I instruct you that that would amount to a conspiracy between the defendant Brand and the defendant Marron.

Likewise, if you should find from the evidence that even if the original loan was without knowledge of understanding that it was to be used for the conduct of an illegal business, yet if you should find from the evidence that a part of that money was paid, or, rather, advanced to Mr. Brand, by Mr. Marron, after he knew that he was using it for the purchase, or in the conduct of an illegal business, that would constitute a conspiracy. Likewise, if you should find from the evidence that after the loan had been made there was a participation by Mr. Marron with Mr. Brand in the conduct of this business, even to the extent that the amount should be paid back to Mr. Marron by Mr. Brand from the proceeds of the business, with full knowledge on the part of Mr. Marron that it was being conducted as an illegal business, that likewise would constitute a conspiracy.

to which ruling the defendants then and there duly and regularly excepted.

XLVIII.

The Court erred in refusing to give to the jury Instruction No. I, which is as follows:

INSTRUCTION No. I.

Gentlemen of the Jury, I charge you that as

to the defendant George L. Birdsall, there is not sufficient evidence to support a verdict of guilty, and I therefore instruct you to acquit said defendant George L. Birdsall.

to which refusal to give such instruction the defendants then and there duly and regularly excepted.

The Court erred in refusing to give to the jury Instruction No. III, which instruction is as follows: [523]

INSTRUCTION No. III.

Gentlemen of the Jury, I charge you that as to the defendant Joseph E. Marron, there is not sufficient evidence to support a verdict of guilty, and I therefore instruct you to acquit the said defendant Joseph E. Marron.

to which refusal to give such instruction the defendants then and there duly and regularly excepted.

The Court erred in refusing to give to the jury Instruction No. XII, which instruction is as follows:

INSTRUCTION No. XII.

Mere probabilities, much less possibilities, conjectures and suspicions, are not sufficient to warrant a conviction, nor is it sufficient that the greater weight or preponderance of the testimony supports the allegations of the indictment, nor is it sufficient that upon the doctrine of chance it is more probable that a defendant is guilty.

to which refusal to give such instruction the de-

fendants then and there duly and regularly excepted.

The Court erred in refusing to give to the jury Instruction No. XVI, which instruction is as follows:

INSTRUCTION No. XVI.

> The defendants are and each of them is, clothed with the presumption of good character and this presumption of good character is a right to which they are, and each of them is, entitled, and of which they, or any of them, cannot be deprived under the law until guilty intent is established to a moral certainty and beyond all reasonable doubt.

to which refusal to give such instruction the defendants then and there duly and regularly excepted.

The Court erred in refusing to give to the jury Instruction No. XVII, which instruction is as follows:

INSTRUCTION No. XVII.

> The defendants in this case are entitled to the independent judgment of each and every juror who has been selected to try them. It is one of the fundamental principles of this government, a principal that has been adopted for the protection of the people that twelve men shall constitute a jury and that no man may be convicted of any offense unless the judgment of each and all of such twelve men shall concur in the conviction that to a [524] moral certainty and beyond every reasonable doubt

the defendant is guilty of the offense charged against him. If, therefore, any one or any number of you, after carefully deliberating upon the evidence in this case, under the instructions of the Court, shall be of the opinion that the defendants have not been proven guilty by the evidence, to a moral certainty and beyond every reasonable doubt, those jurors entertaining such opinion should vote in favor of acquittal and should adhere to that opinion until convinced beyond a reasonable doubt that such opinion is wrong, and they should not be convinced by the mere fact that the majority of the jury differ from them in opinion.

to which refusal to give such instruction the defendants then and there duly and regularly excepted.

The Court erred in refusing to give to the jury Instruction No. XVIII, which instruction is as follows:

INSTRUCTION No. XVIII.

One individual alone cannot be guilty of a conspiracy. The conspiracy must be proven to a moral certainty and beyond a reasonable doubt, against two or more of the alleged conspirators, to justify a verdict of guilty. If, therefore, the evidence does not show, to a moral certainty and beyond a reasonable doubt, that any two or more of the defendants did enter into the conspiracy alleged in the felony indictment, your verdict must be not guilty as to all of the defendants.

to which refusal to give such instruction the defendants then and there duly and regularly excepted.

The Court erred in refusing to give to the jury Instruction No. XXIII, which instruction is as follows:

INSTRUCTION No. XXIII.

I instruct you, gentlemen, that expert witnesses are generally but ready advocates of the theory upon which the party calling them relies, rather than impartial experts upon whose superior judgment and learning the jury can safely rely. Even men of the highest character and integrity are apt to be prejudiced in favor of the party by whom they are employed, and, as a matter of course, no expert is called until the party calling him is assured that his opinion will be favorable. Such evidence should be received with great caution by the jury. (Gribsby vs. Clear Lake Water Co., 40 Cal. 405.)

to which refusal to give such instruction the defendants then and there duly and regularly excepted.

The Court erred in refusing to give to the jury Instruction No. XXIV, which instruction is as follows: [525]

INSTRUCTION No. XXIV.

The testimony of experts is by no means conclusive and when offered, cannot prevent the jury from comparing the documents with a view to question their similarity and it may wholly disregard their testimony and exercise its own judgment. (Castor vs. Bernstein, 2 Cal. App. 704.)

to which refusal to give such instruction the defendants then and there duly and regularly excepted.

The Court erred in refusing to give to the jury Instruction No. XXVI, which instruction is as follows:

INSTRUCTION No. XXVI.

> I charge you that before you can find the defendant George L. Birdsall guilty of the offense charged in this indictment, you must first find that he was a party to the alleged conspiracy set out therein. If you have a reasonable doubt as to whether or not he was a party to such alleged conspiracy, it will be your duty to return a verdict of not guilty as to him.

to which refusal to give such instruction the defendants then and there duly and regularly excepted.

The Court erred in refusing to give to the jury Instruction No. XXVII, which instruction is as follows:

INSTRUCTION No. XXVII.

> I charge you that before you can find the defendant Joseph E. Marron guilty of the offense charged in this indictment, you must first find that he was a party to the alleged conspiracy set out therein. If you have a reasonable doubt as to whether or not he was a party to such alleged conspiracy, it will be your duty to return a verdict of not guilty as to him.

to which refusal to give such instruction the defendants then and there duly and regularly excepted.

The Court erred in refusing to give to the jury Instruction No. XXX, which instruction is as follows:

INSTRUCTION No. XXX.

> I charge you that participation in a conspiracy without knowledge of its existence or knowledge of a conspiracy without participation therein is not sufficient to warrant conviction. Therefore, if you find that the defendant Joseph E. Marron knew that this conspiracy was in being but did not participate therein you must find him not guilty. Likewise, if you find that Joseph E. Marron took any part in this alleged conspiracy but did not [526] have knowledge of its existence, you must find him not guilty.

to which refusal to give such instruction the defendants then and there duly and regularly excepted.

The Court erred in refusing to give to the jury Instruction No. XXXVI, which instruction is as follows:

INSTRUCTION No. XXXI.

> I charge you that participation in a conspiracy without knowledge of its existence or knowledge of a conspiracy without participation therein is not sufficient to warrant a conviction. Therefore, if you find that the defendant George L. Birdsall knew that this

conspiracy was in being but did not participate therein you must find him not guilty. Likewise, if you find that George L. Birdsall took any part in this alleged conspiracy but did not have knowledge of its existence, you must find him not guilty.

to which refusal to give such instruction the defendants then and there duly and regularly excepted.

The Court erred in refusing to give to the jury Instruction No. XXXVI, which instruction is as follows:

INSTRUCTION No. XXXVI.

You are instructed that an accomplice is a person who is liable to prosecution for the identical offense charged against the defendant or defendants on trial in the case in which the testimony of the accomplice is given.

You are further instructed that a conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to convict the defendant or defendants with the commission of the offense; and I further instruct you that the corroboration is not sufficient if it [527] merely shows the commission of the offense or the circumstances thereof.

to which refusal to give such instruction the defendants then and there duly and regularly excepted.

XLIX.

The Court erred in using its judicial discretion

in denying the motion of the defendants, and each of them, for a new trial, and in this connection in refusing to hold and decide as next hereinafter set forth:

1. That the verdict is contrary to the evidence.

2. That the verdict is contrary to the weight of the evidence.

3. That the verdict is contrary to the law as given to the jury by the Court.

4. That the Court erred in refusing defendants Joseph E. Marron and George Birdsall special instructions, Nos. 1, 3, 12, 16, 17, 18, 23, 24, 26, 27, 30, 31 and 36.

5. That the Court erred in so much of its general charge as it left to the jury to determine whether or not the defendants here, or either, or any of them, were the parties to the, or any, conspiracy as charged in the indictment.

6. That the Court erred in admitting evidence contrary to law.

7. That new and material facts have come to light since the trial.

8. That other errors at law appeared upon the trial, prejudicial to defendants.

9. That errors at law occurred during the trial of the case in admitting evidence prior to June, 1923, and subsequent to October 3, 1924, which were duly excepted to by the defendants. [528]

10. Errors of law occurring at the trial and excepted to by the defendants.

11. Further, on the ground of newly discovered evidence.

to which denial and refusal the defendants then and there duly and regularly excepted.

L.

The Court erred in refusing the motion of the defendants in arrest of judgment, in the following particulars:

1. That said indictment does not charge any offense against the laws of the United States nor does it charge said defendants with the doing of anything, the doing of which is forbidden by the laws of the United States.

2. That said indictment does not set forth any facts sufficient in law to constitute a conviction.

3. That there is no fact or circumstance stated therein to advise the Court that an offense has been committed against the United States.

4. That evidence against these defendants has been received on matters pertaining to former jeopardy, which said jeopardy had already attached as to each of them.

5. That said indictment fails to set forth every element of the offense intended to be charged.

6. That it does not set forth any facts sufficient in law to support a conviction.

7. That these defendants have been convicted without due process of law, and in violation of Articles IV, V and VI of Amendments to the Constitution of the United States.

to which refusal the defendants then and there duly [529] and regularly excepted.

LI.

The Court erred in imposing sentence and judgment upon the defendant Joseph E. Marron in the penitentiary for two years, and that he be fined the sum of ten thousand dollars, to which the defendant Joseph E. Marron then and there duly and regularly excepted.

LII.

The Court erred in imposing sentence and judgment upon the defendant George Birdsall in the penitentiary for thirteen months, and that he be fined in the sum of two thousand dollars, to which the defendant George Birdsall then and there duly and regularly excepted.

LIII.

That the judgment and sentence as to the defendant Joseph E. Marron is wholly inconsistent by any evidence showing or tending to show that the said defendant Joseph E. Marron combined, confederated, conspired or agreed with any other defendants in the said indictment named, or with any other persons, or at all, in the city and county of San Francisco and within the jurisdiction of the above-entitled court, or otherwise, or at all, to violate the act of Congress of October 28, 1919, to wit, National Prohibition Act, or in violation of

any law of the United States, and to which the defendant Joseph E. Marron then and there duly and regularly excepted.

LIV.

That the judgment and sentence as to the defendant George Birdsall is wholly inconsistent by any evidence showing or tending to show that the said defendant George Birdsall combined, confederated, conspired or agreed with any other defendants in the said indictment named, or with any other persons, or at all, in the city and [530] county of San Francisco and within the jurisdiction of the above-entitled court, or otherwise, or at all, to violate the act of Congress of October 28, 1919, to wit, National Prohibition Act, or in violation of any law of the United States, and to which the defendant George Birdsall then and there duly and regularly excepted.

LV.

That the introduction in evidence of all the papers, records, files, and particularly United States Exhibit No. 3, over the objection of the defendants Joseph E. Marron and George Birdsall, was and is in violation of the Fourth and Fifth Amendments to the Constitution of the United States, and was in contravention of their constitutional rights guaranteed them under the said Constitution of the United States, to which the defendants then and there duly and regularly excepted.

LVI.

That the articles used at the premises 1249 Polk Street were without color or without right, in that

the said documents, writings, books and records were not described or otherwise identified or referred to in that certain search-warrant introduced in evidence as Government's Exhibit No. 1, and to which the defendants then and there duly and regularly excepted.

LVII.

That the articles used at the premises 1249 Polk Street were without color or without right, in that the said documents, writings, books and records were not described or otherwise identified or referred to in that certain search-warrant introduced in evidence as Government's Exhibit No. ——, and to which the defendants then and there duly and regularly excepted. [531]

WHEREAS, by the law of the land said judgment ought to be given for Joseph E. Marron and George Birdsall, plaintiffs in error, and against the United States of America, defendant in error, said plaintiffs in error, Joseph E. Marron and George Birdsall, do now pray the judgment herein rendered against them, and each of them, to be reversed and annulled, and altogether held for nothing, and the sentence herein imposed upon them, and each of them, respectively to be set aside and held for naught, and that they, and each of them, be restored to all things which they have lost by occasion of the said judgment, and that they be afforded such and any and all relief as may be meet in the premises.

Dated: San Francisco, California, January 20, 1925.

HUGH L. SMITH,
CHAS. J. WISEMAN,
Attorneys for Said Defendants Joseph E. Marron and George Birdsall.

[Endorsed]: Filed Jan. 20, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [532]

In the District Court of the United States for the Northern District of California, First Division.

No. 15,708.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GEORGE HAWKINS et al.,
Defendants.

ORDER ALLOWING WRIT OF ERROR, STAYING SENTENCE AND EXECUTION, etc. (JOSEPH E. MARRON AND GEORGE BIRDSALL).

Now come Joseph E. Marron and George Birdsall, defendants herein, and file herein and present to the Court their petition praying for the allowance of a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit, to have the above-entitled court and submit herewith the assignment of errors intended to be urged by them;

praying also that a transcript of the record, proceedings and papers in this cause, duly authenticated, be sent to the said United States Circuit Court of Appeals for the Ninth Circuit; and praying also that meanwhile all further proceedings in the above-entitled District Court be suspended, stayed and superseded, and that sentence and execution herein be stayed until the final disposition of said writ of error in the aforesaid United States Circuit Court of Appeals.

NOW, THEREFORE, in consideration of the premises, and the Court being fully advised, and each of the above-named defendants having heretofore submitted to the above-entitled court his respective bond for appearance in the United States District Court for the Northern District of California, or in the United [533] States Circuit Court of Appeals for the Ninth Circuit, or in the Supreme Court of the United States of America, as may hereafter in this case be ordered, in the sums following, to wit: defendant Joseph E. Marron in the sum of Ten ($10,000.00) Thousand Dollars; defendant George Birdsall in the sum of Five ($5,000.00) Thousand Dollars, said sums being the amount of bail heretofore fixed by this Court for each of said defendants, respectively, and said bonds, and each of them, having been heretofore accepted and approved by this Court;

IT IS HEREBY ORDERED that the aforesaid writ of error be and the same is hereby allowed;

AND IT IS FURTHER ORDERED that a transcript of the record, proceedings and papers in this

cause, duly authenticated, be sent to the aforesaid United States Circuit Court of Appeals for the Ninth Circuit;

AND IT IS FURTHER ORDERED that sentence and execution herein be stayed until the final disposition of said writ of error in the aforesaid United States Circuit Court of Appeals for the Ninth Circuit;

AND IT IS FURTHER ORDERED that the bond for costs upon the writ of error herein, be and it is hereby fixed at the sum of $250.00 dollars.

Dated: January 20, 1925.

JOHN S. PARTRIDGE,
Judge of the United States District Court for the Northern District of California.

Receipt of a copy of the within order is hereby admitted this 20 day of January, 1925.

STERLING CARR.
By THOS. J. RIORDAN.

[Endorsed]: Filed Jan. 20, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [534]

In the District Court of the United States for the Northern District of California, First Division.

No. 15,708.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
GEORGE HAWKINS et al.,
Defendants.

SUPERSEDEAS BOND (JOSEPH E. MARRON).

KNOW ALL MEN BY THESE PRESENTS, that we, Joseph E. Marron, of the City and County of San Francisco, as principal, and Aloysius I. O'Brien and Genevieve M. O'Brien and Aladino Pisani and Theresa Pisani, as sureties, are held and firmly bound unto the United States of America in the sum of Ten Thousand 00/100 Dollars, lawful money of the United States of America, and the further sum of Two Hundred Fifty 00/100 Dollars, lawful money of the United States of America, to be paid to the United States of America, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents:

Sealed with our seals and dated this 20th day of January, 1925.

WHEREAS, lately at a term of the Southern Division of the United States District Court, for the Northern *Division* of California, in a suit pending in said court between the United States of America and George Hawkins, Walter Brand, Joseph E. Marron, *alias* Eddie Marron, Joseph Birdsall, *alias* George Howard, Charles Mahoney, Patrick Kissane and Joseph Gorham, defendants, a judgment and sentence was made, given, rendered, and entered against the said defendants [535] Joseph E. Marron, George Birdsall, Charles Mahoney, Patrick Kissane and Joseph Gorham, and

said defendants having obtained a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit, to reverse said judgment and sentence and a citation directed to the United States of America to be and appear in the said United States Circuit Court of Appeals for the Ninth Circuit of the State of California, pursuant to the terms, and at the time fixed in said citation, which citation has been duly served.

Now, the condition of the above obligation is such that if the said Joseph E. Marron shall appear either in person or by attorney in the United States Circuit Court of Appeals for the Ninth Circuit, on such day or days as may be appointed for hearing of said cause in said court and prosecute his writ of error, and if the said Joseph E. Marron shall abide by and obey all orders made by the United States Circuit Court of Appeals for the Ninth Circuit in said cause, and shall surrender himself in execution of said judgment and sentence as said court may direct, if the judgment and sentence against him shall be affirmed; and if he shall appear for trial in the District Court of the United States, for the Northern District of California, on such day or days as may be appointed for the retrial by said District Court, and abide by said court, provided the judgment and sentence against him shall have been reversed by the United States Circuit Court of Appeals for the Ninth Circuit, then the above

obligation is to be void; otherwise to remain in full force. [536]

EDDIE MARRON,
Principal.
ALADINO PISANI,
THERESA PISANI,
Sureties.

ALOYSIUS I. O'BRIEN.
GENEVIEVE O'BRIEN.

Signed, sealed, and acknowledged before me this 20th day of January, 1925.

[Seal] THOMAS E. HAYDEN,
United States Commissioner, Northern District of California, at San Francisco.

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

Aloysius I. O'Brien and Genevieve O'Brien and Aladino Pisani and Theresa Pisani, being duly sworn, each for himself says: That he is a resident and householder in said Northern District of California, and is worth in property situate therein *is* the sum of Ten Thousand Two Hundred Fifty Dollars, over and above all of his just debts and liabilities, exclusive of property exempt from execution.

ALOYSIUS I. O'BRIEN.
GENEVIEVE O'BRIEN.
ALADINO PISANI.
THERESA PISANI.

Subscribed and sworn to before me this 20th day of January, 1925.

[Seal] THOMAS E. HAYDEN,
United States Commissioner, Northern District of California, at San Francisco. [537]

United States of America,
Northern District of California,—ss.

Genevieve O'Brien, whose name is subscribed to the foregoing undertaking as one of the sureties thereof, being first duly sworn, deposes and says:

That I am a householder in said District and reside at No. 2158 Bush Street, in the city of San Francisco, State of California, and by occupation, housewife.

That I am worth the sum of Ten Thousand Two Hundred Fifty Dollars, the sum in the said undertaking specified as the penalty thereof, over and above all my debts and liabilities and exclusive of property exempt from execution and that my property, now standing of record in my name, consists in part as follows:

Real estate consisting of business property, 2014 to 2022 Fillmore St.

Two flats—2156–8 Bush St., San Francisco, Cal., $36,000.00. My interest in above property, less encumbrances, is $13,000 net.

That the encumbrances on the foregoing property are as follows:

Mortgage on Fillmore property, $6,000.00.

That my total assets, above all liabilities and obligations on other bonds, is the sum of $15,000.

That I am not surety upon outstanding penal bonds now in force, aggregating total penalty $——.

GENEVIEVE O'BRIEN. (Seal)
ALOYSIUS I. O'BRIEN.

Subscribed and sworn to before me this 20 day of January, A. D. 1925.

[Seal] THOMAS E. HAYDEN,
United States Commissioner, for the Northern District of California. [538]

United States of America,
Northern District of California,—ss.

Aladino Pisani and Theresa Pisani, whose names are subscribed to the foregoing undertaking as one of the sureties, thereof, being first duly sworn, deposes and says:

That I am a householder in said District and reside at No. 2463 Sacto. Street, in the City of San Francisco, State of California, and by occupation housewife.

That I am worth the sum of Ten Thousand Two Hundred Fifty Dollars, the sum in the said undertaking specified as the penalty thereof, over and above all my debts and liabilities and exclusive of property exempt from execution and that my property, now standing of record in my name, consists in part as follows:

Real estate consisting of 2457 to 2467 Sacto. St., S. F. Cal., being six flats, value $24,000.

⅓ interest in flats, 2156–8 Bush St., San Francisco, value $3,000.

That the encumbrances on the foregoing property are as follows:

Mtge. on Sacto. St. property of $8,000.

That my total net assets, above all liabilities and obligations on other bond, is the sum of $19,000.

That we are not surety upon outstanding penal bonds now in force, aggregating total penalty, $——.

THERESA PISANI. (Seal)
ALADINO PISANI.

Subscribed and sworn to before me this 20 day of January, A. D. 1925.

[Seal] THOMAS E. HAYDEN,
United States Commissioner, for the Northern District of California. [539]

In the District Court of the United States, for the Northern District of California, First Division.

No. 15,708.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE HAWKINS et al.,

Defendants.

SUPERSEDEAS BOND (GEORGE BIRDSALL).

KNOW ALL MEN BY THESE PRESENTS, that we, George Birdsall, of the City and County of San Francisco, as principal, and Hugh L. Smith,

as depositor of Liberty bonds as bail, as surety, are held and firmly bound unto the United States of America in the sum Five Thousand 00/100 dollars, lawful money of the United States of America, and the further sum of Two Hundred Fifty Dollars, lawful money of the United States of America, to be paid to the United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 20th day of January, 1925.

WHEREAS, lately at a term of the Southern Division of the United States District Court, for the Northern Division of California, in a suit pending in said court between the United States of America and George Hawkins, Walter Brand, Joseph E. Marron, *alias* Eddie Marron, Joseph Birdsall, *alias* George Howard, Charles Mahoney, Patrick Kissane and Joseph Gorham, defendants, a judgment and sentence was made, given, rendered, and entered against the said defendants [540] Joseph E. Marron, George Birdsall, Charles Mahoney, Patrick Kissane and Joseph Gorham, and said defendants having obtained a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit, to reverse said judgment and sentence and a citation directed to the United States of America to be and appear in the said United States Circuit Court of Appeals for the Ninth Circuit of the State of California, pursuant to the terms, and at

the time fixed in said citation, which citation has been duly served.

Now, the condition of the above obligation is such that if the said George Birdsall shall appear either in person or by attorney in the United States Circuit Court of Appeals for the Ninth Circuit, on such day or days as may be appointed for hearing of said cause in said court and prosecute his writ of error, and if the said George Birdsall shall abide by and obey all orders made by the United States Circuit Court of Appeals for the Ninth Circuit in said cause, and shall surrender himself in execution of said judgment and sentence as said court may direct, if the judgment and sentence against him shall be affirmed; and if he shall appear for trial in the District Court of the United States, for the Northern District of California, on such day or days as may be appointed for the retrial by said District Court, and abide by said Court, provided the judgment and sentence against him shall have been reversed by the United States Circuit Court of Appeals, for the Ninth Circuit, then the above obligation is to be void; otherwise to remain in full force. [541]

And whereas, under the provisions of section 1320a of the United States Revenue Act, approved February 24, 1919, the undersigned has deposited with Francis Krull, United States Commissioner for the Northern District of California, at San Francisco, the official having authority to take and to approve this penal bond, in lieu of surety or sure-

ties, certain United States Liberty bonds as follows, viz.

# 976631 Due 1947 coupons 15 to 60 incl. face value		$1000
1250469	Same	1000
1250470	Same	1000
1313254	Same	1000
1313259	Same	1000
		$5000

And whereas, the above-described United States Liberty bonds are deposited upon the condition and agreement herein given and made that said United States Commissioner shall be and he is hereby authorized and empowered to collect or to sell the above-described bonds so deposited in case of any default in the performance of any of the conditions or stipulations of such penal bond. Such power to sell or to collect such bonds shall extend to his successor in office.

Attached to and made a part of penal bond executed in behalf of George Birdsall in criminal case No. 15708.

[Seal] (Commissioner's) HUGH L. SMITH.

[542]

GEORGE BIRDSALL,
Principal.

HUGH L. SMITH,
Sureties.

Signed, sealed, and acknowledged before me this 20th day of January, 1925.

FRANCIS KRULL,
United States Commissioner, Northern District of California at San Francisco.

[Endorsed]: Approved as to form only.

KENNETH C. GILLIS,
Asst. U. S. Atty.

Filed Feb. 14, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [543]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 15,708.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOSEPH GORHAM et al.,
Defendant.

SUPERSEDEAS BOND (JOSEPH GORHAM).

KNOW ALL MEN BY THESE PRESENTS, that we, Joseph Gorham, of the City and County of San Francisco, State of California, as principal, and John Linehan and Charles F. Kane, both of the City and County of San Francisco, State of California, as sureties, are firmly bound and held unto the United States of America in the full sum of

Five Thousand Dollars, 5000.00/100, lawful money of the United States, to be paid to the United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our hands and dated this 20th day of January, 1925.

WHEREAS, at the time of the Southern Division of the United States District Court for the Northern District of California, First Division, in the suit pending in the said court between the United States of America and Joseph Gorham et al., No. 15,708, on the records of said court, a judgment and sentence was made, given, rendered and entered against said defendant Joseph Gorham in said suit No. 15,708 as aforesaid, and the said Joseph Gorham having obtained a writ [544] of error to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment and sentence made and entered in said suit and the citation directed to the United States of America to be and appear in the said United States Circuit Court of Appeals of the Ninth Circuit at San Francisco pursuant to the terms and at the time fixed in said citation.

Now, the condition of the above obligation is such that if the said Joseph Gorham shall appear, either in person or by attorney, in the United States Circuit Court of Appeals for the Ninth District on such day or days as may be appointed for the hearing of said cause in said court and prosecute said

writ of error, and if the said Joseph Gorham shall abide by and obey all orders made by the United States Circuit Court of Appeals for the Ninth Circuit in the said cause, and shall surrender himself in execution of said judgment and sentence as said Court may direct, if the judgment and sentence shall be affirmed, or the said writ of error dismissed; and if he shall appear for trial in the District Court of the United States of America for the Northern District of California on such day or days as may be appointed for retrial of said District Court and abide by and obey all orders made by said court, provided judgment and sentence against him shall be reversed by the United States Circuit Court of Appeals for the Ninth District, then the above obligation to be void; otherwise, to remain in full force, virtue and effect. [545]

JOSEPH GORHAM.
JOHN F. LINEHAN.
CHAS. F. KANE.

Signed, sealed and acknowledged before me this 20th day of January, 1925.

[Seal] THOMAS E. HAYDEN,
U. S. Commissioner for the Northern District of California at San Francisco.

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

John Linehan and Charles F. Kane, being first duly sworn, each for himself, says:

First, that he is a resident and freeholder in the State and Northern District of California, and is worth in property situated therein, the sum of Five Thousand—$5000.00—Dollars over and above all his just debts and liabilities, exclusive of property exempt from execution.

JOHN F. LINEHAN.
CHAS. F. KANE.

Subscribed and sworn to before me this 20th day of January, 1925.

[Seal] THOMAS E. HAYDEN,
United States Commissioner for the Northern District of California at San Francisco. [546]

United States of America,
Northern District of California,—ss.

Charles F. Kane, whose name is subscribed to the foregoing undertaking as one of the sureties, thereof, being first duly sworn, deposes and says:

That I am a householder in said District and reside at No. 642 – 15th Ave., in the City of San Francisco, State of California, and by occupation drayman.

That I am worth the sum of Five Thousand (5000) Dollars, the sum in the said undertaking specified as the penalty thereof, over and above all my debts and liabilities and exclusive of property exempt from execution and that my property, now standing of record in my name, consists in part as follows:

Real Estate consisting of: House and Lot 642

15th St., S. F., val. $1200; Howard near 14th 30x120, val. $4000; Lot (debt on?) $1000.

That the encumbrances on the foregoing property are as follows: none.

That my total net assets, above all liabilities and obligations on other bonds, is the sum of $50,000.

That I am not surety upon outstanding penal bonds, now in force, aggregating total penalty $——.

CHAS. F. KANE. (Seal)

Subscribed and sworn to before me this 20 day of January A. D. 1925.

[Seal] THOMAS E. HAYDEN,
United States Commissioner, for the Northern District of California. [547]

United States of America,
Northern District of California,—ss.

John F. Linehan, whose name is subscribed to the foregoing undertaking as one of the sureties thereof, being first duly sworn, deposes and says:

That I am a householder in said District and reside at No. 1560 Sacramento Street, in the City of San Francisco, State of California, and by occupation ———.

That I am worth the sum of Five Thousand (5000) Dollars, the sum in the said undertaking specified as the penalty thereof, over and above all my debts and liabilities and exclusive of property exempt from execution and that my property, now standing of record in my name, consists in part as follows:

Real estate consisting of:

3 story on 19th South side, 3 flats, val.	$15,000
2 Flats 2184–86 Howard St., val.	11,000
N. W. Cor. France Ave. & Vienna St., S. F. val.	1,000
S. W. Cor. France Ave. & Athens St., S. F. val.	1,250
	$26,250

That the encumbrances on the foregoing property are as follows: Mtge. $7500.

That my total net assets, above all liabilities and obligations on other bonds, is the sum of $50,000.

That I am not surety upon outstanding penal bonds, now in force, aggregating total penalty $——.

JOHN F. LINEHAN.

Subscribed and sworn to before me this 20 day of January, A. D. 1925.

[Seal] THOMAS E. HAYDEN,
United States Commissioner, for the Northern District of California. [548]

[Endorsed]: Form of bond approved.
KENNETH C. GILLIS,
Assistant United States Attorney.

Filed Jan. 21, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [549]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

Number 15,708—CR.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PATRICK KISSANE et al.,

Defendants.

BOND OF PATRICK KISSANE TO APPEAR ON WRIT OF ERROR.

United States of America,
Northern District of California,—ss.

KNOW ALL MEN BY THESE PRESENTS, that we, Patrick Kissane, as principal, and Catherine Smith and Anna Smith, as sureties, are held and firmly bound unto the United States of America in the sum of Five Thousand ($5000.00) Dollars, to be paid to the said United States of America, for payment of which well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally, by these presents.

SEALED with our hands and seals and dated this 20th day of January, in the year of our Lord one thousand nine hundred and twenty-five.

THE CONDITIONS of the above recognizance is such, that whereas, an indictment has been returned by the United States Grand Jury, and an

indictment filed against said Patrick Kissane on the 17th day of October, A. D. 1924, in the Southern Division of the United States District Court for the Northern District of California, First Division, [550] charging the said Patrick Kissane and others in said indictment named and referred to, with entering into a conspiracy, combination, confederation and agreement, on or about the 1st day of May, 1923, in the Southern Division of the Northern Division of the Northern District of California, and within the jurisdiction of the above-entitled court, to violate the provisions of the National Prohibition Act and the regulations of the Commissioner of Internal Revenue and modifications thereof, in violation of the Act of Congress approved October 28, 1919, and known as the National Prohibition Act; thereafter judgment and sentence was made, rendered and entered, and the said Patrick Kissane having obtained a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgments and sentences made and entered in said suits, and citation directed to the United States of America to be and appear in the Ninth Circuit, at San Francisco, California, pursuant to the terms and at the time fixed in said citation, which said citation has been duly served.

Now, the condition of the above obligation is such, that if the said Patrick Kissane shall appear either in person or by attorney in the United States Circuit Court of Appeals for the Ninth Circuit on such day or days as may be appointed for the hear-

ing of said cause in said court and prosecute said writ of error, and if the said Patrick Kissane shall abide by and obey all orders made by the United States Circuit Court of Appeals for the Ninth Circuit in said causes and shall surrender himself in execution of said judgments and sentences against him shall be affirmed or the said writ of error dismissed. And if he shall appear for trial in a District Court of the United States for the Northern District [551] of California, on such day or days as may be appointed for the retrial by said District Court, and abide by and obey all orders made by said Court, provided the judgments and sentences against him shall be reversed by the United States Circuit Court of Appeals for the Ninth Circuit, then the above obligation to be void; otherwise to remain in full force, virtue and effect.

PATRICK KISSANE. (Seal)

Address: 130 Twenty-first Avenue, San Francisco, California.

CATHERINE SMITH. (Seal).

Address: 2621 Lake Street, San Francisco, California.

ANNA SMITH.

2621 Lake Street, San Francisco, California. [552]

United States of America,
Southern Division of the Northern District of California,
City and County of San Francisco.—ss.

Catherine Smith, one of the sureties whose names are subscribed to the foregoing undertaking, being first duly sworn, deposes and says: I do swear that

I am worth in my own right the sum of Twelve Thousand ($12,000.00) Dollars, after deducting from my property all that is exempt by the Constitution and laws of the State of California from forced sale, and after payment of all of my debts of every description, whether individual or security debts, and after satisfying all encumbrances upon my property which are known to me; I am not a surety on any other bond, recognizance or undertaking; that I reside in the City and County of San Francisco, State of California, and have property in this State, liable to execution, worth more than the sum of Twelve Thousand ($12,000.00) Dollars.

CATHERINE SMITH.

Subscribed and sworn to before me this 20th day of January A. D. 1925.

[Seal] THOMAS E. HAYDEN,

United States Commissioner for the Northern District of California, at San Francisco. [553]

United States of America,

Southern Division of the Northern District of California,

City and County of San Francisco,—ss.

Anna Smith, one of the sureties whose names are subscribed to the foregoing undertaking, being first duly sworn, deposes and says: I do swear that I am worth in my own right the sum of Five Thousand Dollars after deducting from my property all that is exempt by the Constitution and laws of the State of California from forced sale, and after payment

of all of my debts of every description, whether individual or security debts, and after satisfying all encumbrances upon my property which are known to me; I am not a surety on any other bond, recognizance or undertaking; that I reside in the City and County of San Francisco, State of California, and have property in this State, liable to execution, worth more than the sum of Twelve Thousand ($12,000.00) Dollars.

ANNA SMITH.

Subscribed and sworn to before me this 20th day of January A. D. 1925.

[Seal] THOMAS E. HAYDEN,
United States Commissioner for the Northern District of California, at San Francisco. [554]

United States of America,
Northern District of California,—ss.

Catherine Smith, whose name is subscribed to the foregoing undertaking as one of the sureties thereof, being first duly sworn, deposes and says:

That I am a householder in said District and reside at No. 2621 Lake Street, in the city of San Francisco, State of California, and by occupation ———.

That I am worth the sum of Five Thousand Dollars, the sum in the said undertaking specified as the penalty thereof, over and above all my debts and liabilities and exclusive of property exempt from execution and that my property, now standing of record in my name, consists in part as follows:

Real estate consisting of
4 Apts.—2617, 2619, 2621, 2623 Lake St.
Val. $30,000
Lot 17th near Hattie, S. F., Val. 2,500

That the encumbrances on the foregoing property are as follows: Mtge. $5,500—Private.

That my total net assets, above all liabilities and obligations on other bonds, is the sum of $12,000.

That I am not surety upon outstanding penal bonds, now in force, aggregating total penalty $——.

CATHERINE SMITH. (Seal)

Subscribed and sworn to before me this 20' day of January, A. D. 1925.

[Seal] THOMAS E. HAYDEN,
United States Commissioner for the Northern District of California. [555]

United States of America,
Northern District of California,—ss.

Anna Smith, whose name is subscribed to the foregoing undertaking as one of the sureties thereof, being first duly sworn, deposes and says:

That I am a householder in said District and reside at No. 2621 Lake Street, in the City of San Francisco, State of California, and by occupation ———.

That I am worth the sum of Five Thousand ($5000) Dollars, the sum in the said undertaking specified as the penalty thereof, over and above all my debts and liabilities and exclusive of property exempt from execution and that my property, now

standing of record in my name, consists in part as follows:

Real Estate, consisting of as above ½ interest in described properties.

That my total net assets, above all liabilities and obligations on other bond, is the sum of $12,000.

That I am not surety upon outstanding penal bonds, now in force, aggregating total penalty $——.

ANNA SMITH. (Seal)

Subscribed and sworn to before me this 20th day of January A. D. 1925.

[Seal] THOMAS E. HAYDEN,
United States Commissioner, for the Northern District of California. [556]

[Endorsed]: Approved as to form.

STERLING CARR,
U. S. Attorney.
By T. J. SHERIDAN,
Deputy.

Filed Jan. 21, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [557]

BOND FOR COSTS (PATRICK KISSANE).

KNOW ALL MEN BY THESE PRESENTS, that we, Patrick Kissane, as principal, and Catherine Smith and Anna Smith, as sureties, are held and firmly bound unto the United States of America in the full and just sum of Two Hundred and Fifty Dollars to be paid to the said United States of America —— certain attorney, executors, admin-

istrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 20th day of January, in the year of our Lord one thousand nine hundred and twenty-five.

WHEREAS, lately at a District Court of the United States for the Northern District of California, First Division, in a suit depending in said court, between the United States of America, plaintiff, and Patrick Kissane et al., defendants, #15,-708—Criminal, a judgment of conviction and sentence was rendered against the said Patrick Kissane, and the said Patrick Kissane having obtained from said Court a writ of error to reverse the judgment and sentence in the aforesaid suit, and a citation directed to the said United States of America citing and admonishing it to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco in the State of California.

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH: That if the said Patrick Kissane shall prosecute his writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue. [558]

PATRICK KISSANE. (Seal)
CATHERINE SMITH. Seal)
ANNA SMITH. (Seal)

Acknowledged before me the day and year first above written.

[Seal] THOMAS E. HAYDEN,
U. S. Commissioner, Northern District of California at S. F.

United States of America,
Northern District of California,—ss.

Catherine Smith, Anna Smith, being duly sworn, each for *himself*, deposes and says, that *he* is a freeholder in said District, and is worth *to* sum of Five Hundred ($500.00) Dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

CATHERINE SMITH.
ANNA SMITH.

Subscribed and sworn to before me this 20th day of January, A. D. 1925.

[Seal] THOMAS E. HAYDEN,
U. S. Commissioner Northern District of California at S. F.

[Endorsed]: Filed Jan. 21, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [559]

BOND FOR COSTS (JOSEPH GORHAM).

KNOW ALL MEN BY THESE PRESENTS, that we, Joseph Gorham, as principal, and John Linehan and Charles F. Kane, as sureties, are held and firmly bound unto the United States of America, in the full and just sum of Two Hundred and

Fifty ($250.00/100) Dollars, to be paid to the said United States of America, its certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 20th day of January, in the year of our Lord one thousand nine hundred and twenty-five.

WHEREAS, lately at a District Court of the United States for the Northern District of California, First Division, in a suit depending in said court, between the United States of America, plaintiff, and Joseph Gorham, defendant, number 15708, a judgment and sentence was rendered against the said Joseph Gorham and the said defendant, Joseph Gorham, having obtained from said Court a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to the said United States of America citing and admonishing it to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco in the State of California.

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH that if the said Joseph Gorham shall prosecute his writ of error to effect, and answer all damages and costs if he fails to make his plea good, then the above obligation to be void; else to remain in full force and virtue. [560]

JOHN LINEHAN. (Seal)
JOSEPH GORHAM. (Seal)
CHAS. F. KANE. (Seal)

Acknowledged before me the day and year first above written.

[Seal] THOMAS E. HAYDEN,
U. S. Commissioner, Northern District of California at S. F.

United States of America,
Northern District of California,—ss.

John Linehan and Charles F. Kane, being duly sworn, each for himself, deposes and says, that he is a freeholder in said District, and is worth *to* sum of Five Hundred Dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

JOHN LINEHAN.
CHARLES F. KANE.

Subscribed and sworn to before me this 20th day of January, A. D. 1925.

[Seal] THOMAS E. HAYDEN,
U. S. Commissioner Northern District of California, at S. F.

[Endorsed]: Filed Jan. 21, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [561]

BOND FOR COSTS (JOSEPH E. MARRON).

KNOW ALL MEN BY THESE PRESENTS, that we, Joseph E. Marron and Genevieve O'Brien and Theresa Pisani as sureties, are held and firmly bound unto the United States of America in the full and just sum of Two Hundred and Fifty 00/100

dollars, to be paid to the said United States of America, its certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 20th day of January in the year of our Lord one thousand nine hundred and twenty-five.

WHEREAS, lately at a District Court of the United States for the Northern District of California, First Division, in a suit depending in said court between the United States of America, plaintiff, and Joseph E. Marron, defendant, number 15708, a judgment and sentence was rendered against the said Joseph E. Marron, and the said defendant Joseph Marron having obtained from said Court a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to the said United States of America citing and admonishing it to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco in the State of California.

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, that if the said Joseph E. Marron shall prosecute his writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue. [562]

EDDIE MARRON. (Seal)
GENEVIEVE O'BRIEN. (Seal)
THERESA PISANI. (Seal)

Acknowledged before me the day and year first above written.

[Seal] THOMAS E. HAYDEN,
U. S. Commissioner Northern District of California, at S. F.

United States of America,
Northern District of California,—ss.

Genevieve O'Brien and Theresa Pisani, being duly sworn, each for himself deposes and says that he is a freeholder in said District, and is worth *to* sum of Two Hundred Fifty Dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

GENEVIEVE O'BRIEN.
THERESA PISANI.

Subscribed and sworn to before me this 20th day of Jany., A. D. 1925.

[Seal] THOMAS E. HAYDEN,
U. S. Commissioner Northern District of California, at S. F.

[Endorsed]: Filed Jan. 21, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [563]

BOND FOR COSTS (GEORGE BIRDSALL).

KNOW ALL MEN BY THESE PRESENTS, that we, George Birdsall, as principal, and Genevieve O'Brien and Theresa Pisani, as sureties, are held and firmly bound unto the United States of America in the full and just sum of Two Hundred and Fifty 00/100 Dollars, to be paid to the said

United States of America—certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 20th day of January, in the year of our Lord one thousand nine hundred and twenty-five.

WHEREAS, lately at a District Court of the United States for the Northern District of California, First Division, in a suit depending in said court between the United States of America, plaintiff, and George Birdsall, defendant, number 15,708, a judgment and sentence was rendered against the said George Birdsall, and the said defendant George Birdsall having obtained from said Court a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing it to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco in the State of California.

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH that if the said George Birdsall shall prosecute his writ of error to effect, and answer all damages and costs if he fail to make plea good, then the above obligation to be void; else to remain in full force and virtue. [564]

GEORGE BIRDSALL. (Seal)
GENEVIEVE O'BRIEN, (Seal)
2158 Bush St., S. F., Cal.,
THERESA PISANI, (Seal)
2463 Sacto. St., S. F., Cal.

Acknowledged before me the day and year first above written.

[Seal] FRANCIS KRULL,
U. S. Commissioner, Northern District of California, at S. F.

United States of America,
Northern District of California,—ss.

Genevieve O'Brien and Theresa Pisani, being duly sworn, each for himself deposes and says, that he is a freeholder in said District, and is worth *to* sum of Two Hundred Fifty 00/100 Dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

GENEVIEVE O'BRIEN.
THERESA PISANI.

Subscribed and sworn to before me this 20th day of Jany., A. D. 1925.

[Seal] FRANCIS KRULL,
U. S. Commissioner Northern District of California at S. F.

[Endorsed]: Filed Feb. 14, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [565]

In the Southern Division of the District Court of the United States for the Northern District of California, First Division.

No. 15,708.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE HAWKINS et al.,

Defendants.

ORDER THAT ONE ENGROSSED BILL OF EXCEPTIONS MAY BE USED ON APPEAL ON EACH SEPARATE WRIT OF ERROR.

IT IS HEREBY ORDERED, in accordance with the stipulation of counsel for the respective parties entered into, and part of the engrossed bill of exceptions on file herein, that one engrossed bill of exceptions may be used on appeal on the separate writs of errors sued out by Joseph E. Marron, George Birdsall, Patrick Kissane and Joseph Gorham.

Dated: February 5th, 1925.

JOHN S. PARTRIDGE,
United States District Judge.

[Endorsed]: Filed Feb. 5, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [566]

In the Southern Division of the District Court of the United States for the Northern District of California, First Division.

No. 15,708.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE HAWKINS et al.,

Defendants.

ORDER FOR TRANSFER OF ORIGINAL EXHIBITS.

In accordance with the stipulation entered into between counsel for both parties, and incorporated in the engrossed bill of exceptions herein, it is hereby,

ORDERED, that all the exhibits introduced in the above-entitled action in their original form be marked by the Clerk and filed in the office of the Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit.

Dated: February 5th, 1925.

JOHN S. PARTRIDGE,
United States District Judge.

[Endorsed]: Filed Feb. 5, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [567]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT ON WRIT OF ERROR.

I, Walter B. Maling, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing 567 pages, numbered from 1 to 567, inclusive, contain a full, true and correct transcript of the records and proceedings, in the case of United States of America vs. Joseph E. Marron et al., No. 15,708, as the same now reman on file and of record in this office; said transcript having been prepared pursuant to the praecipe for transcript on writs of error (copy of which is embodied herein).

I further certify that the cost for preparing and certifying the foregoing transcript on writs of error is the sum of Two Hundred Forty Dollars and Seventy Cents ($240.70), and that the same has been paid to me by the attorneys for the plaintiffs in error herein.

Annexed hereto are the original writs of error (three), returns to writs of error, and original citations on writs of error (three).

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 11th day of March, A. D. 1925.

[Seal] WALTER B. MALING,
Clerk.
By C. M. Taylor,
Deputy Clerk. [568]

WRIT OF ERROR (JOSEPH E. MARRON AND GEORGE BIRDSALL).

United States of America,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, GREETING:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Joseph E. Marron and George Birdsall, defendants in error, a manifest error hath happened, to the great damage of the said Joseph E. Marron and George Birdsall, plaintiffs in error, as by their complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be

done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable WM. HOWARD TAFT, Chief Justice of the United States, the 20th day of January, in the year of our Lord one thousand nine hundred and twenty-five.

[Seal] WALTER B. MALING,
Clerk U. S. District Court, Northern District of California.

By Lyle S. Morris,
Deputy Clerk U. S. District Court, Northern District of California.

Allowed by:

JOHN S. PARTRIDGE,
Judge.

Receipt of a copy of the within writ of error admitted this 20th day of Jan., 1925.

STERLING CARR,
U. S. Attorney.
KENNETH C. GILLIS,
Asst. U. S. Attorney.

[Endorsed]: No. 15,708. Southern Division of the United States District Court for the Northern District of California, First Division. Joseph E. Marron and George Birdsall, Plaintiffs in Error, vs. United States of America, Defendant in Error. Writ of Error. Filed Jan. 20, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [569]

RETURN TO WRIT OF ERROR (JOSEPH E. MARRON AND GEORGE BIRDSALL).

The answer of the Judges of the United States District Court, for the Northern District of California, to the within writ of error:

As within we are commanded, we certify under the seal of our said District Court, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, within mentioned, at the day and place within contained.

We further certify that a copy of this writ was on the 6th day of March, A. D. 1925, duly lodged in the case in this court for the within named defendant in error.

By the Court:

[Seal] WALTER B. MALING,
Clerk, U. S. District Court, Northern District of California.

By C. M. Taylor,
Deputy Clerk. [570]

CITATION ON WRIT OF ERROR (JOSEPH E. MARRON AND GEORGE BIRDSALL).

United States of America,—ss.

The President of the United States to the United States of America, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the clerk's office of the United States District Court for the Northern District of California, wherein Joseph E. Marron and George Birdsall are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable JOHN S. PARTRIDGE, United States District Judge for the Northern District of California, this 20th day of January, A. D. 1925.

JOHN S. PARTRIDGE,
United States District Judge.

Receipt of a copy of the within citation on writ of error admitted this 20th day of Jan., 1925.

STERLING CARR,
U. S. Attorney.
KENNETH C. GILLIS,
Asst. U. S. Attorney.

[Endorsed]: No. 15,708. Southern Division of the United States District Court for the Southern District of California, First Division. Joseph E. Marron and George Birdsall, Plaintiffs in Error, vs. United States of America, Defendant in Error. Citation on Writ of Error. Filed Jan. 20, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [571]

WRIT OF ERROR (JOSEPH GORHAM).

United States of America,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, GREETING:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Joseph Gorham, defendant in error, a manifest error hath happened, to the great damage of the said Joseph Gorham, plaintiff in error, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy jus-

tice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable WM. HOWARD TAFT, Chief Justice of the United States, the 20th day of January, in the year of our Lord one thousand nine hundred and twenty-five.

[Seal] WALTER B. MALING,
Clerk U. S. District Court, Northern District of California.

By Lyle S. Morris,
Deputy Clerk U. S. District Court, Northern District of California.

Allowed by:

JOHN S. PARTRIDGE,
Judge.

[Endorsed]: No. 15,708. United States District Court for the Nor. District of Cal. U. S. Plaintiff, vs. Gorham, Defendant. Writ of Error.

Filed Jan. 20, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [572]

RETURN TO WRIT OF ERROR (JOSEPH GORHAM).

The answer of the Judges of the United States District Court for the Northern District of California, to the within writ of error:

As within we are commanded, we certify under the seal of our said District Court, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, within mentioned, at the day and place within contained.

We further certify that a copy of this writ was on the 6th day of March, A. D. 1925, duly lodged in the case in this court for the within named defendant in error.

By the Court:

[Seal] WALTER B. MALING,
Clerk, U. S. District Court, Northern District of California.

By C. M. Taylor,
Deputy Clerk. [573]

CITATION ON WRIT OF ERROR (JOSEPH GORHAM).

United States of America,—ss.

The President of the United States, to the United States of America, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the clerk's office of the United States District Court for the Northern District of California, wherein Joseph Gorham, —— plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable JOHN S. PARTRIDGE, United States District Judge for the Northern District of California, this 20th day of January, A. D. 1925.

JOHN S. PARTRIDGE,
United States District Judge.

Receipt of copy of within citation on writ of error admitted this 20th day of January, 1925.

STERLING CARR,
U. S. Attorney.
KENNETH C. GILLIS,
Asst. U. S. Attorney.

[Endorsed]: No. 15,708. United States District Court for the Nor. District of Cal. U. S. A., Plaintiff, vs. Gorham, Defendant. Citation on Writ of Error. Filed Jan. 20, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [574]

WRIT OF ERROR (PATRICK KISSANE).

United States of America,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Southern Division of the Northern District of California, First Division, GREETING:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Patrick Kissane, plaintiff in error, and the United States of America, defendant in error, a manifest error hath happened, to the great damage of the said Patrick Kissane, plaintiff in error, as by complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have

the same at the city of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, the 20th day of January, in the year of our Lord one thousand nine hundred and twenty-five.

[Seal] WALTER B. MALING,
Clerk of the United States District Court, Northern District of California.

By Lyle S. Morris,
Deputy Clerk, U. S. District Court, Northern District of California.

Allowed by:

JOHN S. PARTRIDGE,
Judge. [575]

Due service of the within writ of error is hereby admitted, this 20th day of January, 1925.

STERLING CARR,
Attorney for U. S. of America.

[Endorsed]: No. 15,708—Cr. In the Southern Division of the District Court of the United States for the Northern District of California, First Division. Patrick Kissane et al., Plaintiffs in Error, vs. United States of America, Defendant in Error. Writ of Error. Filed Jan. 20, 1925.

Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [576]

RETURN TO WRIT OF ERROR (PATRICK KISSANE).

The answer of the Judges of the United States District Court for the Northern District of California, to the within writ of error:

As within we are commanded, we certify under the seal of our said District Court, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, within mentioned, at the day and place within contained.

We further certify that a copy of this writ was on the 6th day of March, A. D. 1925, duly lodged in the case in this court for the within named defendant in error.

By the Court:

[Seal] WALTER B. MALING,
Clerk, U. S. District Court, Northern District of California.

By C. M. Taylor,
Deputy Clerk. [577]

In the Southern Division of the United States District Court in and for the Northern District of California, First Division.

Number 15,708—CR.

PATRICK KISSANE et al.,
Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

CITATION ON WRIT OF ERROR (PATRICK KISSANE).

United States of America—ss.

To the President of the United States and to Sterling Carr, Esq., United States Attorney and to Kenneth C. Gillis, Assistant to the United States Attorney, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty (30) days from the date hereof, pursuant to a writ of error duly issued and now on file in the clerk's office of the United States District Court for the Northern District of California, wherein Patrick Kissane et al., are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against said plaintiffs in error, as in the said writ

of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable JOHN S. PARTRIDGE, United States District Judge for the Northern District of California, this 20th day of January, A. D. 1925.

JOHN S. PARTRIDGE,
United States District Judge.

Receipt of the within citation on writ of error is hereby admitted this 20th day of January, 1925.

STERLING CARR,
United States Attorney. [578]

[Endorsed]: No. 15,708—Cr. In the Southern Division of the District Court of the United States for the Northern District of California, First Division. Patrick Kissane et al., Plaintiffs in Error, vs. United States of America, Defendant in Error. Citation on Writ of Error. Filed Jan. 20, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [579]

[Endorsed]: No. 4523. United States Circuit Court of Appeals for the Ninth Circuit. Joseph E. Marron and George Birdsall, Plaintiffs in Error, vs. United States of America, Defendant in Error. Joseph Gorham, Plaintiff in Error, vs. United States of America, Defendant in Error. Patrick Kissane, Plaintiff in Error, vs. United States of America, Defendant in Error. Tran-

script of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, First Division.

Filed March 12, 1925.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the Southern Division of the United States District Court for the Northern District of California.

No. 15,708.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH E. MARRON, PATRICK KISSANE, et al.,

Defendants.

AMENDMENT TO ENGROSSED BILL OF EXCEPTIONS.

Through inadvertence and excusable neglect, the following portion of the proceedings had in the trial of the above-entitled cause, on the 14th day of January, 1925, being omitted from the engrossed bill of exceptions, allowed and settled heretofore by the Judge of the above-entitled court, pursuant to stipulation of the parties hereto:

On the 14th day of January, 1925, at the conclusion of the charge of said Court and prior to the submission of the cause to the jury, and in the presence of the jury, defendant Patrick Kissane addressed the Court as follows:

Mr. TAAFFE.—"On behalf of defendant Kissane, if your Honor please, I respectfully take an exception to that portion of your Honor's charge with reference to passive acquiescence and the duties of police officers."

. . . "Now that statute passed by the State of California, to say nothing of the Statute of the United States places or imposes the duty upon every peace officer to use his best endeavors to enforce that law, like every other law, and, where he finds that persons are transgressing it to see that they are arrested and prosecuted in accordance with that Statute and the Statute of our Congress. In considering therefore the case of these two police officers, you must, of course, as I know enough about you to know that you will, eliminate from your minds, either for or against your personal opinions with regard to whether or not it ought to be the law, and start out with the proposition that it was the duty of this sergeant and patrolman, who are before you, to enforce that law, and to investigate and arrest, if they found any person transgressing it. I do not mean that you are to keep this distinction in mind that any man can be found guilty of conspiracy merely because he is an officer of the law and may have been merely careless or derelict in his duty; that might be a matter for investigating by the authorities of his own department, but it is a matter with which we have no concern; that is to say, mere negligence, or mere shutting of a man's eyes to a violation of the law would not constitute him a conspirator; . . . Mere negligence or even shutting a man's eyes to a violation of the law would not constitute him a conspirator;

but, if, on the other hand, he knew that the law was being violated and either by passive connivance or by actual agreement with the persons who were transgressing that law, he would be guilty of conspiracy with them, whether he received any compensation or not. You are to determine, therefore, Gentlemen, from all the facts and circumstances of this case, whether or not these two police officers either actively or tacitly, even without a word being spoken, agreed with these other defendants, or any of them, to permit liquor to be sold at that place, or to be taken into it, or transported to it, or there possessed, or there possessed for the purpose of sale. If you find that there was such an agreement, tacit or otherwise, then these two defendants are guilty of conspiracy." . . . "If you find that the entries in this book were kept in the regular course of business, however illegal and contrary to law that business may be, and you should find that the evidence warranted you in finding that there was any combination or agreement, tacit or otherwise for those two police officers to allow that place to run, then you are entitled to take into consideration all entries in that book to the effect that one of the expenses of that place was this money which is alleged to have been paid to Sergeant Gorham and Kissane. Of course, Gentlemen, no man is to be convicted of a crime because somebody writes his name in a book. But if you find three things—first,

that these entries of Kissane and Gorham were the Kissane and Gorham here on trial; secondly, that the book was kept in the regular course of business as showing as a part of the expenses the payment of money to these officers; and, third, if you find that there was any tacit, or other understanding that the place was to be run without police interference, then you may consider these entries as bearing upon the guilt or innocence of Gorham or Kissane or either of them."

The above proposed amendment to the engrossed bill of exceptions heretofore filed herein contains all of the instructions given and excepted to, requested and refused, and exception to the refusal thereof noted, in so far as defendant and plaintiff in error Patrick Kissane is concerned, and all the proceedings thereon relating to the trial, judgment, and conviction and sentence in the above-entitled cause, omitted from said engrossed bill of exceptions.

WHEREFORE, said defendant and plaintiff in error prays that the same may be settled, allowed and approved as an amendment to the engrossed bill of exceptions filed herein, to be used on appeal from the judgment herein.

Dated: May 6th, 1925.

JOS. L. TAAFFE,
Attorney for Patrick Kissane.

IT IS ORDERED that the foregoing amendment to the bill of exceptions heretofore filed herein is correct in all respects, and is hereby allowed, ap-

proved and settled, and may be made a part of the record herein.

Dated: May 6th, 1925.

JOHN S. PARTRIDGE,
United States District Judge.

No. 15,708.

UNITED STATES OF AMERICA,
vs.
JOSEPH E. MARRON, PATRICK KISSANE, et al.

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

I, Walter B. Maling, clerk of the United States District Court for the Northern District of California, do hereby certify the foregoing to be a full, true and correct copy of the original amendment to bill of exceptions in the above-entitled cause, as the same remains of record and on file in the office of the clerk of said court.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 7th day of May, A. D. 1925.

[Seal] WATER B. MALING,
Clerk of the United States District Court, Northern District of California.

By C. W. Calbreath,
Deputy Clerk.

Receipt of a copy of the within amendment to engrossed bill of exceptions and order of District Judge acknowledged this 6th day of May, 1925.

STERLING CARR,
United States Attorney.
By THOMAS J. SHERIDAN,
Asst. United States Attorney.

[Endorsed]: Filed May 6, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

[Endorsed]: No. 15,708. In the Southern Division of the District Court of the United States for the Northern District of California, —— Division. United States of America, Plaintiff, vs. Joseph E. Marron, Patrick Kissane, et al., Defendants. Certified Copy of Amendment to Engrossed Bill of Exceptions.

No. 4523. United States Circuit Court of Appeals for the Ninth Circuit. Filed May 7, 1925. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.